72-15

No. 72-1584

MAY 25 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

JOHN DOWDY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
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No._____

JOHN DOWDY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, John Dowdy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on 12 March 1973.

OPINION BELOW

The opinion of the court of appeals, and the order Modifying the opinion (App. B and C, *infra,* pp. 2a-38a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 1a) was entered on 12 March 1973. A timely petition for rehearing was denied on 27 April 1973 (App. C, *infra*, p. 37a). This petition for a writ of certiorari was filed within thirty days of the date of denial of the petition for a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the surreptitious electronic recording of a conversation held between a Congressman in his legislative office and an informer-constituent who had previously sought and successfully obtained from the federal government immunity for himself and his mother from threatened prosecution in exchange for his promised cooperation, should have been excluded from evidence on the grounds that same (a) violated Fourth Amendment rights of petitioner and the concept of the separation of government powers, and (b) was a part of unfair law enforcement methods.

2. Whether the admission of evidence by the trial court that was held by the court of appeals to be improper as entailing an inquiry into legislative acts and motives that was protected from outside examination by the Speech or Debate Clause (Article I, § 6) of the Constitution and which therefore required a reversal of conviction and a remand for new trial on count 1 (conspiracy to accept unlawful compensation in violation of 18 U.S.C. 203), count 2 (conspiracy to obstruct a proceeding before the Department of Justice in violation of 18 U.S.C. 1505), count 3 (unlawful travel in interstate commerce in order to facilitate bribery in violation of 18 U.S.C. 201), and counts 4 and 5 (perjury in violation of 18 U.S.C. 1621), likewise requires a reversal and remand for new trial of the remaining counts 6, 7 and 8 (perjury in violation of 18 U.S.C. 1621).

3. Whether a conviction of perjury in violation of 18 U.S.C. 1621 meets the two-witnesses rule where same is based upon the uncorroborated testimony of a single witness and the electronically recorded testimony of this single witness.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 6, of the United States Constitution, provides in pertinent part:

> "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Amendment IV to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

18 U.S.C. 1621 provides in pertinent part:

> "Whoever, having taken an oath bfeore a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall,

except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both . . ."

STATEMENT OF THE CASE

Petitioner, John Dowdy, a member of the United States House of Representatives from Texas since 1952, was convicted in the United States District Court for the District of Maryland on eight counts of an indictment charging him with conspiracy to accept unlawful compensation in violation of 18 U.S.C. 203 and 371 (Count 1), conspiracy to obstruct a proceeding pending before the Department of Justice, in violation of 18 U.S.C. 1505 and 371 (Count 2), unlawful travel in intertstate commerce in order to facilitate bribery, in violation of 18 U.S.C. 201 and 1952 (Count 3), and perjury in violation of 18 U.S.C. 1621 (Counts 4-8).

Petitioner was a member of the House Judiciary Committee, and the Committee on the District of Columbia, and Chairman of that committee's Subcommittee on Investigations. By House Resolution 44, the Committee was authorized to conduct a full and complete investigation and study of the operation and administration of any department of the Government of the District of Columbia, and the operation and administration of any independent agency or instrumentality operating solely in the District. In 1963-1964, petitioner's subcommittee had held extensive hearings and investigations of urban renewal within the District of Columbia. Petitioner wrote an article on the subject, published in *Reader's Digest,* and made a number of speeches throughout the United States in opposition to governmental urban renewal.

Nathan H. Cohen was an owner and President of Monarch Construction Corporation (Monarch), and his mother was the corporate secretary and office manager. Monarch was engaged in the home improvement business in the District of Columbia and employed Myrvin C. Clark as its Sales Manager. In early 1965, Cohen and the

Monarch officials were under investigation by various agencies of the federal and District of Columbia governments for sales and financing practices.

In early September 1965, Cohen approached Clark with the idea that petitioner could arrange immunity for Cohen from possible criminal proceedings by the Department of Justice in the District of Columbia by allowing Cohen to testify before the subcommittee about Monarch's operations. Clark talked with petitioner and mentioned that Cohen had vital and important information of national importance that would change the laws of the Federal Housing Administration, that he wanted to present the material and testify before the committee, as he wanted immunity because he feared self-incrimination. Clark told petitioner that the Cohen family was wealthy and that Clark would "hit" the Cohens for a "political contribution" for petitioner, and the latter agreed to talk with Cohen (App. B, *infra*, p. 6a).

On or about September 16, 1965, Cohen met with petitioner in the latter's office. Hayden Garber, counsel to the Committee, was present during part of the meeting (id., p. 6a). Cohen testified that petitioner told him in this conversation that he felt he could help Cohen in his aim to avoid prosecution and that they agreed upon a "fee" of $25,000.

Testimony was offered by the government tending to establish that on September 22, 1965, Cohen and his associates packed $25,000 in cash in an attache case, which Clark handed to petitioner later that day at the Atlanta Airport, Atlanta, Georgia. Petitioner testified that he did not receive any payments, and offered evidence to support his denial.

In the ensuing months, Garber and petitioner made investigations of the pertinent material submitted to the subcommittee, held meetings, and talked with government officials involved in the Monarch affairs. The court below held that much of this testimony constituted protective legislative acts and that they transgressed the Speech or Debate Clause. This aspect of the record is dealt with in

more detail in the government's petition for a writ of certiorari in *United States v. Dowdy,* No. 72-1529, filed in May 1973.

Monarch went out of business in September 1965 and Cohen moved his business operations to Baltimore. During most of 1969, Cohen was the subject of federal investigations in two jurisdictions. First, he was the continuing subject of investigation by the United States Attorney's office for the District of Columbia growing out of his earlier activities with Monarch. Second, in the fall of 1969, a special grand jury for the District of Maryland was investigating obstruction of justice charges and SEC matters, and Cohen was under active investigation.

Near the end of October 1969, Cohen sought immunity from the Maryland investigation by placing a telephone call to the United States Attorney, stating that he "had some information which might be helpful or interesting to the government, that [he thought he] could help the government prosecute an important case and offered to make some arrangements to discuss it with" the district attorney. Cohen received the reply that he was the subject of a very important case himself and that there was a good chance he was going to be the subject of criminal prosecution (Transcript, Vol. III, pp. 80-82).

In December, Cohen had a conference with the U. S. Attorney in Baltimore and represented that he had some information to give the government which could result in the prosecution of a congressman for illegal acts in return for immunity from prosecution for himself and his mother. A business associate of Cohen testified at trial that the latter told him that he thought he had gotten "off the hook," stating that he had given the district attorney a congressman (A. p. 352).

Following three or four meetings and negotiations in December, Cohen entered into immunity agreements with the government on 30 December 1969 (G. Exs. 29 and 30; A. pp. 386-8) which covered both Cohen and his mother. The agreement provided, inter alia, that "the Government agrees that to the extent that you, in the course of furnish-

ing information to the Government pursuant to this letter, disclose material of a substantive nature relating to the Monarch investigation, such information will not be disseminated for use against either you or your mother, Thelma Cohen, in that investigation and will not, in any case, be used against you or your mother in any criminal prosecution" (A. p. 386).

A telephone call was made on 12 January 1970 by Cohen to petitioner at his legislative office in Washington, D. C. This call was made at the direction of the district attorney from the FBI office in Baltimore and an FBI agent monitored the call (A. pp. 151, 197).

On 20 January 1970, an FBI agent, at the direction of the district attorney, placed a recording device on Cohen's person (A. p. 207) and two FBI agents and Cohen drove from Baltimore to the Rayburn Building in Washington, D. C. There, the FBI agent positioned himself near petitioner's doorway and Cohen went into petitioner's office and there had a discussion with him. After Cohen completed his conference with petitioner, he and the FBI agent drove a short distance where they took the recording device off of Cohen's person and recovered the recording.

Prior to the conversation with petitioner, Cohen talked with the district attorney and received some suggestions from him as to the nature of the conversation to have with petitioner (A. pp. 156-7), and he was directed to mention in the talk the fact that petitioner had been paid $25,000 (A. pp. 157, 219). Cohen did not disclose to petitioner that their conversation was being recorded and petitioner was unaware of that fact.

Prior to trial, petitioner moved to suppress the tape and the transcription thereof and the motion was denied. At trial, the tapes and the transcriptions thereof were admitted into evidence over the objection of petitioner. The tape of the conversation in petitioner's office on 20 January 1970 formed the basis for perjury counts 6, 7 and 8.

Cohen testified before the grand jury in Baltimore on

17 February 1970. On 20 February, the district attorney wrote petitioner that the grand jury was investigating allegations concerning possible violations by petitioner and others of federal criminal statutes relating to bribery, obstruction of justice and conspiracy, and informing him that the grand jury "has asked me to extend an invitation to appear before it on Tuesday, March 3, or Wednesday, March 4, 1970, if you wish to do so" (G. Ex. 133).

Petitioner thereafter did testify before the grand jury and was questioned at length by the district attorney. The questions that were asked petitioner that are set forth in counts 6, 7 and 8 (A. pp. 36, 40-41) are strikingly similar to the statements found in the 20 January recording (A. pp. 397-406). At no time prior to petitioner's appearance before the grand jury did the government notify him that it had in its possession the monitored tapes of his conversations with Cohen.

REASONS FOR GRANTING THE WRIT

I.

THE ELECTRONIC RECORDING OF A CONGRESSMAN'S CONVERSATION WAS UNLAWFUL

Far-reaching constitutional and policy considerations arise when the executive branch of the federal government engages in surreptitious acts of electronic surveillance, through an informer who has sought and been granted immunity from prosecution, of a legislator in the privacy of his congressional office, and when the fruits of such surveillance are used in the trial of a multicount indictment charging the Congressman with the violation of federal statutes. The questions presented are of substantial public importance and warrant review by this Court.

A. FOURTH AMENDMENT RIGHTS VIOLATED

The court below found that the recordings and the transcriptions of the conversations between Cohen and petitioner in the latter's legislative office were not violative of his Fourth Amendment rights basing its holding on the opinion of this Court in *United States v. White*, 401 U. S.

745 (App. B, *infra*, p. 25a). In our view, the court of appeals has misconstrued the *White* opinion.

In *White*, this Court's plurality opinion was based upon the premise that one of the parties to the interception had voluntarily consented thereto, and was not faced with consent which had been induced by promise of immunity, stating:

> "Because the court below did not reach the issue of Jackson's consent, we decline to do so." 401 U. S. at 747, fn. 1.

The court below concluded that as Cohen had consented to the recording of the conversation, such recording and the transcription made from same did not violate petitioner's Fourth Amendment rights and were therefore admissible into evidence (App. B, *infra*, p. 25a). In our view, the court of appeals has overlooked the fact that Cohen's consent was obtained only because he sought and obtained as consideration for such consent not only immunity for himself but also for his mother. This Court has held in *Weiss v. United States*, 308 U. S. 321, 330, that consent given with the clear expectation of leniency will not be sufficient to meet the authorization of consent requirements for overhearing communications. Cohen's so-called consent to the recording of the conversation in petitioner's office was the proximate result of a governmental promise of immunity directly tied to his capitulation. It was this promise, the *quid pro quo* of his actions, that vitiated his consent and distinguishes the instant case together with *Weiss* from the decisions relied upon by the court of appeals (App. B, *infra*, pp. 25a-26a).[1]

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[1]In January 1970, attorneys for the government sought and obtained an order from the United States District Court for the District of Maryland authorizing the FBI to intercept "by means of electronic devices to be placed, with the consent of Nathan Cohen, on his person and on telephones utilized by him, conversations, telephonic or in person . . ." between Cohen and petitioner. Petitioner urged that this order was invalid to permit the surveillance of this conversation in the District of Columbia and outside the jurisdiction of the District Court of Maryland. The court below stated on this point (App. B, *infra*, p. 25a):

> It also follows that we need not consider the validity of the court orders authorizing the recordings. They were sought and obtained prior to the decision in *White*, undoubtedly as a pre-

The government's purpose of engaging in electronic surveillance of conversations between petitioner and Cohen in the congressional office on January 20 was not to uncover unlawful business that petitioner might there have been transacting, *Lewis v. United States,* 385 U. S. 206, 211; rather, the Attorney General's memorandum of January 7, 1970, to the Director of the FBI, directing the electronic surveillance in question, provided that the investigation in question be "conducted to determine whether the statements made by Messrs. Cohen and Levitt can be *corroborated* to a degree that criminal prosecution would be warranted" (A. p. 92). Petitioner could not anticipate any risk that conversations conducted in his congressional office would be bugged by an informer at the behest of law enforcement authorities. By permitting Cohen, a constituent, to call at his congressional office on January 20, petitioner was protected by the Fourth Amendment against executive intrusion upon the sanctity of his office and the privacies of his official life incident thereto. *Gouled v. United States,* 255 U. S. 299, 304-306.

B. Separation of Powers Concept Transgressed

This case also involves another question concerning the electronic surveillance of a member of Congress. In *United States v. United States District Court,* 407 U. S. 297, the Court noted that "individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government."

We urge that the separation of powers concept prevents the executive branch from invading the privacy of a legislator's office to there surreptitiously electronically record the conversations of a legislator with a constituent. See *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579, 593-4 (Frankfurter, J., concurring).

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cautionary measure on the part of the government. Since *White* makes clear that no warrant or order is needed, any discussion of whether the district court in Maryland may authorize the recording of a conversation with a party in the District of Columbia or in Texas would be academic.

The issue posed of the executive branch engaging in the electronic recording of a conversation in a legislator's office is one of first impression in any court, and was so recognized by the court below (App. B. *infra*, p. 26a).

C. Overzealous Law Enforcement Present

It is well settled that this Court in the exercise of its supervisory authority over the administration of criminal justice in the federal courts has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions, and in formulating such rules of evidence, the Court has been guided by considerations of justice which are not restricted to those derived solely from the Constitution or to strict cannons of evidentiary relevance. *Nardone v. United States,* 308 U. S. 338, 341-2; *Mesarosh v. United States,* 352 U. S. 1; *McNabb v. United States,* 318 U. S. 332, 343. As pointed out by Mr. Chief Justice Warren in his concurring opinion in *Lopez v. United States,* 373 U. S. 427, 441:

> "I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system . . ."

As noted above, Cohen turned a grand jury investigation against himself, his mother, and associates into an investigation of a Congressman, and the government used Cohen to electronically record conversations in the petitioner's congressional office on subjects previously suggested by the district attorney.

The government's invitation to petitioner to appear before the grand jury was extended thirty days after the electronic surveillance and after both Cohen and Clark had testified before the grand jury. The striking similarity between the taped conversation and the questions propounded

by the government to petitioner before the grand jury, and which formed the basis for counts 6 to 8, indicate that the purpose of these questions was to lay the groundwork for the indictment of petitioner for perjury and nothing else.

At no time prior to petitioner's appearance before the grand jury did the government notify him that it had in its possession the monitored tapes of his conversation taken in his office. Petitioner's invitation to appear before the grand jury was a "trap for the unwary innocent and [not a] trap for the unwary criminal." *Sherman v. United States,* 356 U. S. 369, 372.

As observed by this Court in *Hoffman v. United States,* 341, U. S. 479, 485:

> ". . . Enforcement officials taking the initiative in grand-jury proceedings and courts charged with their superintendence should be sensitive to the considerations making for wise exercise of such investigatory power, not only where constitutional issues may be involved but also where the noncoercive assistance of other federal agencies may render it unnecessary to invoke the compulsive process of the grand jury."

II.

The Improper Admission of Evidence Concerning Legislative Acts And Motives Requires a New Trial on All Counts in the Bill of Indictment

In *United States v. Johnson,* 383 U. S. 169, 185, this Court refrained from passing on the question whether Congressman Johnson was entitled to a new trial on all counts where evidence of legislative acts was improperly admitted which required a new trial on one count. This Court held in *Johnson* (383 U. S. at 185-6):

> "The Court of Appeals held that Johnson was entitled to a new trial on the conflict of interest counts because the admission of evidence concerning the speech aspect of the conspiracy count was prejudicial

> on these other counts as well. The Government reserved the right to contest the order of a new trial, but, except for a footnote in its reply brief, it did not so argue in this Court; on the contrary it stated in oral argument that it stood solely on its position with reference to the conspiracy count. In these circumstances we find no occasion to review the Court of Appeals' assessment of the record in this respect."

The court below in the instant case has apparently overruled the position previously taken by it in the *Johnson* case that "the conclusion is unavoidable that this mass of evidence and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts." *United States v. Johnson,* 337 F. 2d 180, 204. The court below noted its inconsistent treatment of the subject by the footnote statement that "we would be less than candid if we did not state that we think its [remand in *Johnson* for retrial on all counts] correctness has been severely shaken" (App. B, *infra,* p. 21a, fn. 21).

The holding of the court below, we submit, is inconsistent with this Court's holding in *United States v. Johnson, supra,* and is a question of substantial public importance and warrants review by this Court. It is submitted that in the context of the totality of the trial court's charge to the jury in this case, the jurors could not so compartmentalize the evidence offered, and once convinced that the petitioner was guilty on one count, it became easy for a normal juror to conclude that he was guilty on other counts as to which they might otherwise have had doubts.

See *Chapman v. California,* 386 U. S. 18, 23-4, where it was stated:

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless . . ."

See also, *Fahy v. Connecticut,* 375 U. S. 85, 86-7; *Kotteakos v. United States,* 328 U. S. 750, 764; *Bachellar v. Maryland,* 397 U. S. 564.

The court of appeals concluded that because petitioner's testimony before the grand jury conflicted with the statements contained in the electronically recorded conversation, that fact "made slight the possibility that the jury had resort to the erroneously admitted evidence of legislative acts" (App. B, *infra,* p. 23a). But this was the precise point involved in *United States v. Johnson, supra,* where the court of appeals stated that even "though we find the evidence sufficient to find a guilty verdict on all counts, the invalidity of count one as applied to Johnson was obviously prejudicial to his rights to the unbiased consideration of the jury on the remaining counts," and, as shown, this Court on review, 383 U. S. at 186, found no occasion to review the court of appeals' ruling in that respect. As stated by this Court in *Bollenbach v. United States,* 326 U. S. 607, 614-15:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts . . ."

See also *Payne v. Arkansas,* 356 U. S. 560, 567-8.

We submit that in multicount indictments the proper standard to apply was set forth in *Bruton v. United States,* 391 U. S. 123, 135-7:

> "Nevertheless, as was recognized in Jackson v. Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . ."

III.

The Decision Below Raises Important And Recurring Problems Concerning the Two-Witnesses Rule in Perjury Trials

Although the government has on several occasions asked this Court to abandon the rule which bars a conviction of perjury under 18 U.S.C. 1621 on the uncorroborated testimony of a single witness, this Court has refused to do so. *Hammer v. United States,* 271 U. S. 620, 626; *Weiler v. United States,* 323 U. S. 606, 609. Further, this Court pointed out in *Weiler* (323 U. S. at 610):

> ". . . Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy . . ."

The court below, in our view, misapplied the *Weiler* standards for determining whether sufficient corroborative evidence was presented to sustain the conviction on counts 6 through 8 where there was only a single witness, Cohen. The court of appeals has thereby decided a federal question in a way in conflict with applicable decisions of this Court. Although the court of appeals ruled that the district court had instructed the jury to apply the rule requiring a witness and corroboration, nevertheless the jury was permitted to rely on the electronically recorded tapes of the conversation between Cohen and peitioner to constitute the necessary corroborative testimony. The alleged falsity of petitioner's testimony before the grand jury, as covered by counts 6-8, was sought to be proven by a single witness, Cohen. The only evidence relied upon by the government to support this testimony was the tape of Cohen's conversation with petitioner in the latter's office on 20 January. The basis for the special rule which bars conviction for perjury solely upon the evidence of a single witness is the belief that in a perjury trial the evidence must consist of something more convincing than one man's word against

another's. Accordingly, a tape of an electronically recorded conversation is merely a reproduction of the unsworn statement by the same witness, and cannot serve as corroborating evidence of a substantial nature so as to sustain a conviction under the general perjury statute. Furthermore, the tape of the 20 January conversation does not meet the standard of trustworthiness because it was not a clear, legible recording. The prosecutor represented to the trial court that it was "absolutely essential for the jury to intelligently understand these tapes [that they] have a transcript of what's been prepared" (A. p. 221), and with candor stated (A. p. 222):

> "I remind the Court that Count 6, 7 and 8 charge him with perjury in the Grand Jury under oath about the very conversation of January 20.
>
> "I am frank to say to the Court that unless the Jury either hears the tapes again and again and again or has some kind of a volition, that it is frankly a guess as to whether Mr. Dowdy did or not testify truthfully as to that conversation, what they heard yesterday as to January 20th. It is kind of a fast shuffle and I don't think it does justice to the facts of the case to ask the jury to decide the matter."

The question involving the use of wiretaps and electronically recorded conversations to support a perjury conviction is of substantial public importance and warrants review by this Court. The number of court-ordered wiretaps and surveillance under the Omnibus Crime Control Act is very great as suggested by the list of cases listed in the decision of *United States v. Robinson,* 472 F. 2d 973, 974-6. It is there shown that 74 cases have resulted in published decisions by the courts on the limited issue of whether the proper authorization of the Attorney General or his designated representative has been obtained and this Court has granted certiorari to review this matter in *United States v. Giordano,* 469 F. 2d 522 (4 Cir. 1972), Docket No. 72-1057. Obviously, there are many more court-authorized electronically recorded conversations which have not reached the courts for decision, and there is no

way to measure the number of instances where an individual has voluntarily consented to recording conversations under the aegis of *United States v. White.*

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May, 1973

Appendix A

COURT OF APPEALS JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 72-1614

United States of America,

Appellee,

vs.

John Dowdy,

Appellant.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed as to Counts one through five and a new trial granted; affirmed as to Counts six through eight, consistent with the opinion of this Court filed herewith.

s/ William K. Slate, II
CLERK

FILED
March 12, 1973
William K. Slate, II
CLERK

Appendix B

COURT OF APPEALS OPINION
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1614

United States of America,

Appellee,

vs.

John Dowdy,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Roszel C. Thomsen, Senior District Judge.

Argued October 31, 1972 Decided March 12, 1973.

Before WINTER, RUSSELL, and WIDENER, Circuit Judges.

Thornton H. Brooks and C. Allen Foster (McLendon, Brim, Brooks, Pierce and Daniels on brief) for Appellant; Barnet D. Skolnik, Attorney, Department of Justice, (George Beall, United States Attorney, Stephen H. Sachs, Special Assistant United States Attorney, John G. Sakellaris, Assistant United States Attorney, on brief) for Appellee.

WINTER, Circuit Judge:

Former Congressman John Dowdy, of Texas, was found guilty by a jury of each of the charges contained in an eight-count indictment.* In counts one and two, defendant was charged, together with Myrvin C. Clark who pleaded guilty, with conspiracy (18 U.S.C.A. § 371 (1969)) to violate the conflict of interest statute (18 U.S.C.A. § 203),[1] and conspiracy to violate the obstruction of justice statute (18 U.S.C.A. § 1505),[2] respectively. In the third count, defendant was accused of interstate travel (18 U.S.C.A. § 1952) to facilitate federal bribery (18 U.S.C.A. § 201).[3] In counts four through eight, defendant was charged with five acts of perjury (18 U.S.C.A. § 1621 (1969)) before a federal grand jury in the District of Maryland. Defendant was sentenced to imprisonment and to pay a fine on each count. The sentences were consecutive in part and concurrent in part, so that the aggre-

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[1]In pertinent part, 18 U.S.C.A. § 203(a) (1969) subjects to criminal sanctions:

> Whoever . . . directly or indirectly receives or agrees to receive . . . any compensation for any services rendered or to be rendered . . . at a time when he is a Member of Congress . . . in relation to any proceeding . . . controversy, charge, [or] accusation . . . in which the United States is a party or has a direct and substantial interest, before any department . . .

[2]18 U.S.C.A. § 1505 (1969) makes criminally liable:

> Whoever corruptly . . . endeavors to influence, obstruct, or impede . . . the due and proper administration of the law . . . before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House . . .

*A summary of the indictment is attached as an appendix to this opinion.

[3]18 U.S.C.A. § 1952(a) (1969) renders criminal travel in interstae commerce or the use of the facilities of interstate commerce, *inter alia*, to promote any unlawful activity. "Unlawful activity" is defined in § 1952(b) (2) to include bribery in violation of the laws of the United States. 18 U.S.C.A. § 201 (1969) creates the crime of bribery of a "public official" which is defined in § 201(a) to include a Member of Congress.

gate sentence was imprisonment for eighteen months and a fine of $25,000. Defendant appeals.

Defendant attacks his convictions on two principal grounds: first, that the indictment and the government's proof thereunder impugned his legislative acts as a member of the House of Representatives; and second, that certain tapes resulting from electronic surveillance and transcriptions of conversations should not have been admitted into evidence, principally with respect to the perjury counts. Specifically, with regard to the first ground of attack, defendant contends that substantial portions of the allegations of the indictment[4] and of the proof at trial revolved around his actions as Chairman of the Subcommittee on Investigations of the House of Representatives Committee on the District of Columbia in investigating whether a complaint, made to all of the members of the committee, warranted subcommittee hearings; and that his actions and motivations in this regard were immune from judicial scrutiny under the "speech or debate" clause of the constitution.[5] In regard to the admission into evidence of the tapes and transcriptions, defendant makes numerous objections. He claims violation of his fourth amendment rights, entrapment of him by the United States Attorney, duress upon the party to the taped conversations who purportedly consented to the taping, and violation of the constitutional concept of separation of powers.

We agree that defendant's convictions on the two conspiracy counts (counts one and two), the interstate travel count (count three), and the first two of the five perjury counts (counts four and five) were obtained by the use of evidence which infringed the speech or debate clause, but we conclude that the trial of the remaining

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[4]See Appendix, and particularly Overt Acts, numbers 19 through 23 of Counts One and Two.

[5]U. S. Const. Art. I, § 6, cl. 1:
The Senators and Representatives . . . shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses . . .; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.* (emphasis added).

perjury counts (counts six-eight) was not tainted by the evidence improperly admitted to prove the other counts. Moreover, we see no valid objection to the admission of the tapes and transcriptions with respect to the remaining perjury counts (counts six-eight) of the indictment. We also conclude that violations of counts one-five might have been proved without improper inquiry into legislative acts. We therefore reverse as to counts one, two, three, four and five, affording the government the right to try them anew if it be so advised, and affirm as to counts six through eight.

I.

To establish the context in which defendant's various contentions arise, we state first what the government's proof, if believed, and certain uncontroverted proof, offered by the defendant, showed. Other facts will be stated elsewhere in the opinion.

Congressman Dowdy, at the time of trial, was a member of the House of Representatives, representing the Second Congressional District of Texas. He had been a member of Congress since 1952. At all times pertinent to the trial of the case, he was a member of (1) the House Judiciary Committee, and (2) the Committee on the District of Columbia, and Chairman of that committee's Subcommittee on Investigations. By House Resolution 44, adopted February 16, 1965, the Committee on the District of Columbia, acting as a whole or by subcommittee, was authorized to conduct a full and complete investigation and study of the operation and administration of any department of the Government of the District of Columbia, and the operation and administration of any independent agency or instrumentality operating solely in the District. In 1963-1964, defendant's subcommittee had held extensive hearings and investigations of urban renewal within the District of Columbia. Defendant wrote an article on the subject, published in a magazine of national circulation, and made a number of speeches throughout the United States in opposition to governmental urban renewal.

A certain Nathan H. Cohen was an owner and President of Monarch Construction Corporation (Monarch). Monarch employed Myrvin C. Clark as its Sales Manager and Cohen's "right-hand man." Monarch was engaged in the home improvement business in Maryland and in the District of Columbia. In the early part of 1965, it was under investigation by various agencies of the federal and District of Columbia governments for its sales and financing practices. Apparently there was little question that Monarch and some of its principals had engaged in wholesale violations of the law.

Defendant made a speech to Monarch employees about urban renewal on June 1, 1965. Cohen first met the defendant at this time. Several months later, Cohen approached Clark with the idea that defendant could arrange immunity for Cohen from possible criminal proceedings by allowing Cohen to testify before the subcommittee about Monarch's operations. Clark communicated with defendant and mentioned that Cohen had information of national importance, wanted to testify before the committee, but wanted immunity because he feared self-incrimination. Clark told defendant that the Cohen family was wealthy and that Clark would "hit" the Cohens for a "political contribution" for defendant. Defendant agreed to talk with Cohen.

On or about September 16, 1965, Cohen met with defendant at defendant's office. Hayden Garber, Esquire, counsel to the committee, was present during part of the meeting. While Cohen and defendant were alone, Cohen informed defendant that his purpose in wishing to testify was to gain immunity and thereby avoid criminal prosecution. Defendant assured Cohen that he could handle the matter and a "fee" of $25,000 was agreed upon.

Earlier that same month, Clark counseled Cohen to use what Cohen termed "the front door-back door approach," that is, "of using a legitimate reason and legitimate excuse proffered at the same time that you tried to pay somebody or bribe somebody or get them on your side behind the scenes." To that end, Clark and Cohen prepared a series of documents asking for an investigation and

hearing by the District of Columbia Committee and sent them to every member of the committee, along with a covering letter from Cohen's private attorney. Clark knew and informed Cohen that defendant would be in charge of any "investigation" which might result from this submission. Clark also informed Cohen that Clark had sought and obtained defendant's prior approval of the submission to all members of the committee. Shortly after this submission, the Cohen complaint was assigned to defendant's subcommittee for investigation by the Chairman of the House Committee on the District of Columbia, Hon. John L. McMillan of South Carolina.

On September 22, 1965, Cohen and his associates packed $25,000 in cash in an attache case, which Clark handed to defendant later that day at the Atlanta Airport, Atlanta, Georgia.

Shortly after September 22, 1965, defendant advised Clark that Cohen could not receive immunity by appearing as a witness before the committee, but that there was more than one way to handle the situation. On September 30, 1965, Cohen and defendant met in a Washington hotel and discussed that fact that the immunity plan would not work. The defendant advised Cohen that there was "more than one way to skin a cat" and if Cohen was not satisfied with results, defendant would return Cohen's money to him.

Meanwhile, Garber studied the material which Cohen and Clark had submitted to the committee and arranged a meeting with Cohen, which was held prior to October 5, to discuss the details of his complaints. Garber decided that he should find out what the License and Inspection Division of the District of Columbia had in its files. He prepared a subpoena, took it to defendant on October 13, and defendant signed it upon Garber's advice. Garber obtained the documents and took them back to his office for study.[6]

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[6]Although proof of this event was adduced at trial, the court instructed the jury that this was a legislative act which the jury might not consider in deliberating on the question of defendant's guilt.

Next, Garber communicated with the Department of Justice, seeking information concerning Monarch's affairs. He was directed to the attorney who was familiar with them, and Garber arranged for that attorney to meet with defendant and Garber at defendant's office. The meeting was held in October, 1965. They discussed the Justice Department's case against Monarch and apparently the production of certain of the government's written reports of investigations of Monarch's affairs.[7] The jury was told fully of the matters which were discussed.

During October, 1965, defendant made certain documents available to Clark. Clark had them copied, giving the copies to Cohen and returning the originals to defendant. These documents were internal investigative files of the Housing and Home Finance Agency (HHFA) and records of the District of Columbia Department of Licenses and Inspections. The custodian of these records testified that they had been turned over to Garber on October 13, 1965, presumably in response to the subpoena.

Garber also arranged a meeting between defendant, Garber, and two officials of the Federal Housing Administration, parent agency to HHFA, in defendant's office on October 22, 1965. The findings and status of the Monarch investigation were discussed and certain internal investigative reports were left with defendant.[8]

Following these meetings, defendant told Clark that he had "explained [his] personal interest in the situation, a private interest" to the Department of Justice, i.e., the first Assistant United States Attorney for the District of Columbia who was in charge of the Monarch investigation in that

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[7]The representative of the Department of Justice testified that defendant made no "improper" requests to him in connection with the meeting. In view of our concept of the scope of the "speech or debate" clause, and the protection that defendant was entitled to claim thereunder, this testimony is not significant.

[8]These officials also testified that defendant asked nothing "illegal or improper" of them. But, as will be later shown, proof of the substance of the discussion transgressed the "speech or debate" clause even if it was exculpatory.

office, and that defendant did not think that the assistant would "push this thing any further." Clark testified, "I asked him [defendant] if that meant there would not be a prosecution, and he winked at me and sort of pushed me a little, and said he thought it was all taken care of and that I wouldn't have any more problems with Monarch Construction Corporation."

Cohen and defendant had no further communication until 1967, when Cohen became aware that a federal grand jury in the District of Columbia was investigating Monarch for possible postal violations. Defendant assured Cohen that he would not be indicted, since "the last thing the Government did before it dropped the case was to give it to the Post Office Department." In 1968, a special federal grand jury was impaneled in Washington to investigate certain home improvement frauds. Cohen, in May 1969, learned that Monarch was a prime target and he and Clark again sought defendant's help. At first, defendant said that he could not help due to the change in administrations. But when Clark offered defendant $5,000 if no criminal prosecution resulted, defendant agreed to help. Defendant referred Cohen to a Washington attorney who was a good friend of the prosecutor and who, it was represented, could "take care of the problem." They consulted the attorney, who said that he could fix the case for a fee of $30,000. At Cohen's request, defendant met with the attorney and the prosecutor, and then reported that, "he was confident that it could be handled this way, that he was sure there would be no prosecution." Cohen made a partial payment of the agreed amount and six months passed without incident.

Then, Cohen became the subject of an unrelated federal investigation in Maryland. Cohen reached an understanding with the United States Attorney for the District of Maryland pursuant to which Cohen disclosed the nature and details of his relationship with defendant in exchange for immunity. On January 20, 1970, Cohen had a conversation with defendant in defendant's office in Washington, which Cohen recorded without defendant's knowledge. Defendant was a party to a number of statements, some of which were made by him and some of which were made to

him. When defendant appeared voluntarily before the federal grand jury in Baltimore on March 4, 1970, he flatly denied under oath either making or being a party to them. These statements served as the basis for perjury counts six, seven and eight of the indictment: defendant's representation to Cohen that he had told Clark in 1965 that Cohen's problems would have to be "handled" in some way other than Congressional immunity and that had it not been for defendant's efforts Cohen would probably have already been prosecuted; Cohen's representation to defendant that Cohen had paid defendant $25,000 in 1965 and that this payment had "done its job;" and defendant's representation to Cohen that defendant would try to learn the status of the Monarch investigation and defendant's expressed hope that he could "do something" for Cohen about it.

Perjury counts four and five were based upon defendant's denial under oath before the federal grand jury that he had met Clark in the airport in Atlanta, Georgia, and that he had received any monies for or on behalf of Cohen or Monarch other than an honorarium of $500 for making the June 1, 1965 speech.

II.

The speech or debate clause on which defendant's first principal contention is grounded, was adopted by the Constitutional Convention without debate or opposition.[9] Its roots lie in the conflict between Parliament and the Crown,[10] and that experience has taught that:

> In order to enable and encourage a representative

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[9]See 5 Debates on the Federal Constitution 406 (J. Elliot ed. 1876); 2 Records of the Federal Convention of 1787, p. 246 (M. Farrand rev. ed. 1966).

[10]See Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 SUFFOLK L.R. 1, 3-16 (1968); Comment, *Brewster, Gravel,* and Legislative Immunity, 73 COL.L.REV. 125, 126-29 (1973). See generally C. Wittke, The History of English Parliamentary Privilege (Ohio State Univ. 1921).

> of the public to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.[11]

To effect this protection, the speech or debate clause not only provides a defense on the merits, but spares the legislator from having to devote his time and efforts to defending himself in court.[12]

The law governing Congressional immunity under the speech or debate clause[13] has been most recently discussed in three cases: United States v. Johnson, 383 U.S. 169 (1966) (*Johnson II*), aff'g 337 F.2d 180 (4 Cir. 1964) (*Johnson I*), on remand 419 F.2d 56 (4 Cir. 1969) (*Johnson III*), cert. denied 397 U.S. 1011 (1970); United States v. Brewster, 408 U.S. 501 (1972); and United States v. Gravel, 408 U.S. 606 (1972).[14] We shall consider these cases and undertake to apply their holdings to the instant case.

In *Johnson II*, the Supreme Court held that the speech or debate clause provided immunity to a Congressman from indictment and trial under a general conspiracy statute for conspiracy to defraud the government where proof of the charge involved inquiry into his motivations for a speech given in the Congress. "The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and . . . that is precisely what

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[11]2 Works of James Wilson (Andrews ed. 1896) 38, as quoted in Tenney v. Brandhove, 341 U.S. 367, 373 (1951).

[12]Powell v. McCormack, 395 U.S. 486, 502-03 (1969); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Doe v. McMillan, 459 F.2d 1304 (D.C. Cir.), cert. granted 408 U.S. 922 (1972).

[13]See Comment, 73 COL. L.REV. 125, supra, n. 10; Note, The Bribed Congressman's Immunity from Prosecution, 75 YALE L.J. 335 (1965); Cella, 2 SUFFOLK L.R., supra, n. 10. See also Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U. PA. L.REV. 960 (1951).

[14]The district court's decision preceded the Supreme Court's decisions in *Brewster* and *Gravel*.

the Speech or Debate Clause generally forecloses from executive and judicial inquiry." 383 U.S. at 180. The Court ruled that the concept of "legislative act" should be broadly construed to effectuate the purpose of ensuring the independence of the legislature. 383 U.S. at 182.[15] But with regard to other counts charging that Johnson improperly interceded with the executive, the Court stated: "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 383 U.S. at 172. The Court did not pass on our holding in *Johnson I* that the evidence of legislative acts improperly admitted with regard to the speech count fatally contaminated Johnson's conviction on the improper attempt to influence the executive counts.[16] On remand, the district court dismissed the substantive count based upon delivery of the speech, but convicted Johnson on the improper influence counts; and we affirmed in *Johnson III*. In short, under *Johnson II*, the speech or debate clause does not bar a prosecution founded on a general criminal statute which "does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." 383 U.S. at 185. The Court expressly reserved whether the speech or debate clause barred a prosecution

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[15]See Kilbourn v. Thompson, 103 U.S. 168 (1881); Tenney v. Brandhove, 341 U.S. 367 (1951); Coffin v. Coffin, 4 Mass. 1 (1808).

[16]The government sought and obtained a writ of certiorari extending to this aspect of our decision as well as to the proper scope of the speech or debate clause. In its brief before the Supreme Court, the point was scarcely mentioned; in oral argument, it was abandoned. As a consequence, it was not reviewed by the Supreme Court. *Johnson II*, 383 U.S. at 185-6. See also the discussion and implied criticism of the government's conduct in the dissenting opinion of Chief Justice Warren, *Johnson II*, 383 U.S. at 186-9. The Chief Justice, joined by Mr. Justice Douglas and Mr. Justice Brennan, would have reversed us on this point and reinstated the convictions on the substantive improper attempt to influence counts.

"entailing inquiry into legislative acts or motivations . . . founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 185.

Brewster held that the speech or debate clause did not compel dismissal of an indictment for bribery, even though the *quid pro quo* for the bribe was a patently legislative act, since it would not be necessary for the government to inquire into legislative acts or their motivations—"to inquire into how [Brewster] spoke, how he debated, how he voted, or anything he did in the chamber or in committee"—in order to prove a violation of the bribery statute. 408 U.S. at 526. Thus, *Brewster* invoked and applied the first exception articulated in *Johnson II:* prosecution under a general statute which does not draw into question the Congressman's legislative acts or motivations. In reaching this conclusion, the Court seemingly contracted the broader interpretation of legislative act apparently advanced in *Johnson II.*[17] *Brewster* defined protected legislative acts as "an act generally done in Congress in relation to the business before it." 408 U.S. at 512. The Court ruled that acceptance of a bribe does not fall within this definition and therefore judicial inquiry into such receipt would not be an impermissible inquiry into a Congressman's motivation for a legislative act. The Court again expressly reserved the "narrowly drawn statute" exception. 408 U.S. at 529 n. 18.

Gravel further elaborated the definition of legislative act as any act constituting "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings . . . with respect to . . . matters . . . within the jurisdiction of either House." 408 U.S. at 625. Particularly pertinent here is its holding that the speech or debate clause protects a Congressman from inquiry "except as it proves relevant to investigating possible third-party crime, concerning any act, in itself not criminal, performed by [him] . . . in the

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[17]See 73 COL. L. REV., supra n. 10, at 146.

course of [his] employment, *in preparation for the subcommittee hearing.*" 408 U.S. at 629. (emphasis added).

III.

Defendant contends that under these cases, the various counts of the indictment and a substantial part of the government's proof offered thereunder offended the speech or debate clause and transgressed defendant's immunity in that regard.

A. *The Indictment.* If the indictment is read standing alone, we think its various counts are unobjectionable, with the sole exception of overt act 19 of the first two counts of the indictment. Overt act 19 charges that defendant caused to be issued a subpoena to the District of Columbia Department of Licenses and Inspections commanding the production of certain documents before defendant's subcommittee. Although counts one and two do allege (overt act 5) that Monarch made a complaint to the full committee, the other overt acts do not spell out that its chairman designated defendant's subcommittee to investigate it. The only fair inference that can be drawn from the statement of overt act 19 is that defendant was alleged to have performed a legislative act, because, absent an allegation that procurement of a subpoena was fraudulently obtained, we can infer that the subpoena was issued for some purpose of the subcommittee. *Gravel* teaches that inquiry concerning the business of a subcommittee, irrespective of the motives and purposes of a member thereof, is forbidden by the speech or debate clause because it is as much a legislative act as a speech on the floor of the House or a vote on pending legislation.[18] See also *Brewster*, 408 U.S. at 525 ("acts which occur in the regular course of the legislative pro-

[18]The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.
Gravel, 408 U.S. at 625.

cess"); Dombrowski v. Eastland, 387 U.S. 82, 84-5 (1967) (Per Curiam); Tenney v. Brandhove, 341 U.S. 367, 376-8 (1951); Doe v. McMillan, 459 F.2d 1304, 1311-14 (D.C. Cir.), cert. granted 408 U.S. 922 (1972).

However, if the speech or debate clause, as interpreted by *Johnson II, Brewster* and *Gravel,* is to be given meaning, the validity of an indictment must be determined in the context of the proof which is offered to sustain it, or in the context of facts adduced on a motion to dismiss it. Otherwise, the validity of an indictment would depend solely on what the prosecutor elected to allege, and he would be limited only by his sense of self-restraint in alleging all facts, including those unfavorable to his case. Since the cases make clear that the clause protects against the burden of defending,[19] as well as creates a substantive defense, we think that the speech or debate clause constitutes a limitation on what may be alleged as well as what may be proved, although it may be necessary to go beyond the indictment to obtain the full meaning of what appear facially to be perfectly proper allegations.

Specifically, overt acts 20-23 fall into this category. Overt act 20 alleged that the defendant requested that an Assistant United States Attorney meet with him; overt act 21 alleged the fact of the meeting; overt act 22 alleged defendant's meeting with officials of FHA and HHFA; and overt act 23 alleged the receipt and acceptance of documents from officials of FHA and HHFA. The indictment nowhere alleged that defendant was chairman of a subcommittee which was assigned the investigation of Monarch's complaint to determine if formal hearings should be held, or that defendant conferred with various officials and obtained various government documents in regard to other investigations of Monarch's affairs, or that these conferences and the obtention of these documents were, at least arguably, the performance of defendant's legislative functions. Absent such allegations or proof of them, overt acts 20-23 are plainly proper under *Johnson II,* for they can be read as charging that the defendant improperly attempted to influence the executive branch. But when these overt

[19]See n. 12, supra.

acts are read in the light of the facts adduced at trial, then it is evident that these same overt acts might be interpreted as preparation for a subcommittee hearing on Monarch and, as such, would be protected legislative acts under *Gravel*. When we read overt acts 20-23 in the light of the proof at trial, we conclude that they transgress the speech or debate clause, as we shall discuss further.

However, it does not follow that counts one and two should be dismissed because of the inclusion of this improper matter. Rather, the offending overt acts could have been stricken and the counts would still be legally sufficient since 18 U.S.C.A. § 371 requires, in addition to an agreement to commit any offense against the United States, only that "one or more of such persons do *any* act to effect the object of the conspiracy . . ." (emphasis added).

Otherwise, the various counts of the indictment are not barred by the speech or debate clause. Under *Johnson II* and *Brewster*, the speech or debate clause does not bar an indictment under a general statute where the government can make a prima facie case without inquiring into legislative acts. It follows that the speech or debate clause did not bar count one, as modified, since the government can show that defendant conspired to receive compensation in relations to a legislative proceeding without proving defendant's efforts to influence the outcome of the proceeding. Similarly, it did not bar count three, since the government could show that defendant traveled across state lines to accept money for an act to be performed without proving that he later performed the act. Likewise, the perjury counts are not barred, because the government could prove perjury without reference to any legislative acts. Since count two (obstruction of justice), as modified, count four (perjury regarding the meeting at the Atlanta Airport), and count five (perjury regarding the acceptance of money at the Atlanta Airport) would not require inquiry into legislative acts and motivations to show guilt thereunder, these counts do not transgress the speech or debate clause.

B. *The Proof*. While we conclude that none of the various counts were barred in their entirety by the speech or debate clause, we view the evidence offered at trial dif-

ferently. The proof fell into three general categories: (1) defendant's conversations and arrangements with Clark and Cohen, (2) his grand jury testimony, and (3) his conversations and arrangements with the United States Attroney, FHA and HHFA concerning Monarch. In connection with the last category, a considerable amount of documentary evidence of reports of investigations which defendant and Garber obtained was admitted into evidence.

We have no doubt that evidence falling into the first two categories was not barred by the speech or debate clause. With respect to the first category, *Brewster* ruled that the government may allege and prove that a Congressman "solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act." 408 U.S. at 527. With regard to the second category, since voluntary testimony before a federal grand jury is not "an act generally done in Congress in relation to the business before it," it follows that the government may allege and prove facts concerning such testimony. 408 U.S. at 512.

But, we are equally firm in our conclusion that evidence falling into the third category was barred. This evidence was an examination of defendant's actions as a Congressman, who was chairman of a subcommittee investigating a complaint, in gathering information in preparation for a possible subcommittee investigatory hearing. As such, it was an examination of legislative acts, as defined by *Gravel*,[20] and is condemned by *Johnson II* and

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[20]Much of our analysis with respect to the indictment and the proof is premised on the holding in *Gravel* that the speech or debate clause bars inquiry into a Congressman's preparation for a subcommittee hearing. 408 U.S. at 628-29. *Gravel* articulated two exceptions to this rule. Inquiry would be permissible: (a) "if it proves relevant to investigating possible third party crime," and (b) if the Congressman's act is itself criminal. 408 U.S. at 629. Although these exceptions, if read literally, might conceivably be applied in this case, we conclude that the context in *Gravel*—alleged theft and receipt of stolen classified papers—limits their application to cases where the inquiry focuses on the manner and methods of obtaining certain information, and not to cases where the inquiry focuses on the Congressman's motivations for obtaining certain information. Otherwise, these exceptions would engulf the rule.

Brewster when the prosecution proceeds under a statute of general application. It was a complete disclosure of all that transpired including proof of documents that were obtained and, hence, was a general inquiry into the legislative acts of a Congressman and his motives for performing them.

We conclude that the proof was not received in a prosecution under a narrowly drawn statute, a possible exception suggested by *Johnson II*, 383 U.S. at 185, and *Brewster*, 408 U.S. at 529 n. 18. Of course, what is a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members," *Johnson II*, 383 U.S. at 185, is defined in neither *Johnson II* nor in *Brewster*. In the instant case, the government concedes, with respect to count two, that neither the underlying obstruction statute nor the conspiracy statute qualify as narrowly drawn statutes. It argues, however, with respect to count one, that the object of the conspiracy was to violate a narrowly drawn conflict of interest statute, that, with respect to count three, the object of the interstate travel was to violate a narrowly drawn bribery statute, and that in both counts the narrowly drawn underlying statutes determine the nature of the prosecution notwithstanding that the conspiracy and the interstate travel statutes are general in nature.

We cannot agree that the statutes underlying counts one and three are "narrowly drawn." The language of the Chief Justice writing for the Court in *Brewster*, in which the suggestion in *Johnson II* was given continued life, was: "we express no views on the question left open in *Johnson* as to the constitutionality of an inquiry that probes into legislative acts or the motivation for legislative acts if Congress specifically authorizes *such* in a narrowly drawn statute." 408 U.S. at 529. (emphasis added). We read the Court to be saying that if Congress, in recognition that either House is ill-equipped to conduct a trial, or that a trial interferes unduly with other legislative business, or for any other reason, concludes to permit judicial inquiry into legislative acts or motivations to relieve itself of that burden, it will do so in clear and unmistakable language.

In short, there must be a specific and express delegation of authority to inquire into legislative acts or motivations. Both the conflict of interest statute and the bribery statute, although they are applicable to Congressmen and others, are lacking in an express delegation of this nature. Although Congress explicitly authorized the executive and judicial branches to prosecute Congressmen under these statutes, there is no specific expression of intent on the part of Congress that these prosecutions be allowed to proceed beyond the bounds of *Johnson II* and *Brewster* by probing into legislative acts and the motivations therefore. Since the speech or debate clause so clearly vests the authority to make such an inquiry exclusively in Congress, delegation of that power is not to be implied. And there is no need, as we show elsewhere in this opinion, to imply the power in order to give meaning and make effective the statutes underlying counts one and three.

We therefore conclude that the speech or debate clause as interpreted in *Johnson II, Brewster,* and *Gravel* prohibited this proof.

Of course, defendant's actual motives in communicating with various government officials and in obtaining certain government documents could have been, as the government contends, for improper non-legislative purposes. But we reject the government's argument that it was proper for the jury to receive all of the evidence and to pass upon the issue of what activities were legislative, protected from examination by the speech or debate clause, and what were not. In the first place, the government's argument is nothing more than a *post hoc* justification of what was done; the case was not tried on the theory which is now urged. Other than to be told to disregard proof of overt act 19 in arriving at a verdict on counts one and two of the indictment, the jury was not told how to weigh and consider the evidence before it. It was not instructed to consider first admissibility and, only if it concluded that the evidence was admissible under standards stated by the court, to consider the evidence on the issue of guilt or innocence. Rather, it was free to consider the evidence in

arriving at its verdict irrespective of whether it concluded that defendant was performing a legislative act.

Secondly, the question of admissibility of evidence is generally a question solely for the court. IX Wigmore, Evidence § 2550 (3d ed. 1940); McCormick, Evidence § 53 (2d ed. Cleary 1972). See Rule 26, F.R.Cr.P. This salutary rule undoubtedly stems, in part, from general recognition of the difficulty that a juror, untrained in the law, may have in divorcing from his mind the probabative value of the evidence even if, under proper instruction, he concludes that it was inadmissible. See *Johnson I*, 337 F.2d at 204. Cf. Jackson v. Denno, 378 U.S. 368 (1964).

But, an even more basic flaw in the government's argument is its implied assertion concerning the scope of protection afforded by the speech or debate clause; namely, that it is applicable only when a pure legislative motive is present. The clause does not simply protect against inquiry into acts which are manifestly legislative. In our view, it also forbids inquiry into acts which are purportedly or apparently legislative, even to determine if they are legislative in fact. Once it was determined, as here, that the legislative function (here, full investigation of the Monarch complaint to determine if formal subcommittee hearings should be held) was *apparently* being performed, the propriety and the motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry. In Tenney v. Brandhove, 341 U.S. 367, 377-78 (1951), it was pointed out:

> The claim of an unworthy purpose does not destroy the privilege . . . The privilege would be of little value if they [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives . . . The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.

See Coffin v. Coffin, 4 Mass. at 27; Doe v. McMillan, 459 F.2d at 1312-13.

We are not impressed by the government's argument that a consequence of our holding will be that dishonest Congressmen will evade prosecution by creating a smokescreen of arguably legislative activity to camouflage illegal non-legislative acts. Constitutionally permissible sanctions are available: Under *Johnson II* and *Brewster*, the government can go far in indicting and proving a case of criminal conspiracy and other substantive offenses without alleging or proving that the illegal objectives of the conspiracy were fully realized by the Congressman. Congress may have the right to enact a narrowly drawn statute proscribing the illegal conduct. *Johnson II; Brewster*. In any event, the House or Senate clearly has jurisdiction to try any member who is a wrongdoer and punish him for his derelictions.

IV.

Having concluded that evidence was adduced at trial and considered by the jury in violation of the speech or debate clause, we turn to a consideration of the effect on each of defendant's convictions. The most pertinent authority to be considered is *Johnson I*. There, where Johnson was indicted for conspiracy and for substantive offenses which were the objects of the conspiracy, we held that evidence violative of the speech or debate clause fatally infected the jury's consideration of Johnson's guilt or innocence of the substantive offenses with which he was charged. 337 F.2d at 204.[21] Our conclusion was based upon our notions of fairness and prejudice to Johnson, and it did not stem from considerations of constitutional law.

It is manifest that defendant's convictions under the conspiracy counts one and two must be reversed, since the proof to support them included, in our view, clear violations of the speech or debate clause. But as to them, since the essence of the offenses charged was an illegal *agreement*

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[21]See n. 16 for the history of this holding. We would be less than candid if we did not state that we think its correctness has been severely shaken.

to accomplish illegal objectives, guilt could be established by proof of the agreement, accompanied by proof of one or more non-legislative overt acts to carry it out, without proof of legislative acts immunized from inquiry by the speech or debate clause. It follows that the government should be afforded the right of retrial. See *Brewster*.

The same is true with regard to the count charging interstate travel to commit bribery (count three). The erroneously admitted evidence of legislative acts was arguably relevant to proof of bribery, and we cannot confidently say that the jury did not consider it in finding guilt. Moreover, the travel count arose from an alleged conspiracy to accomplish certain illegal legislative acts, and was tried in the context of prohibited disclosure of those legislative acts. We can only conclude, on the authority of *Johnson I*, that the violation of the speech or debate clause so tainted the trial of this substantive count that defendant's conviction on it should be set aside. Since count three could be proved without reference to legislative acts, a new trial will be awarded.

With respect to counts four and five, alleging perjury in defendant's denial of the meeting in the Atlanta Airport and his receipt of $25,000, we conclude once again that the erroneously admitted evidence of legislative acts fatally infected the convictions. The evidence on these counts was sharply conflicting. Unrestricted by any limiting instruction, the jury, in passing upon the credibility of the government's witnesses, was permitted to rely upon evidence of legislative acts to conclude that the meeting and delivery of the money had occurred and, hence, that the denials were willful material untruths. Since we cannot say that the jury did not, defendant's convictions on counts four and five should be set aside; but since these counts could have been proved without reference to legislative acts, a new trial will be awarded.

The remaining perjury convictions (counts six-eight) stand on a different footing. These counts allege perjured denials of statements made in recorded or transcribed conversations with Cohen. Defendant's guilt or innocence of them depended in no part upon the accuracy of the state-

ments he made to Cohen in defendant's office in Washington, or upon the accuracy of what Cohen said to him at that time in that place. Rather, his guilt or innocence depended solely upon whether, when he denied what he and Cohen had said before the Maryland federal grand jury, his denial was a willful untruth.[22] Because the earlier conversations had been taped and the grand jury testimony stenographically reported, the evidence to show guilt on these counts was overwhelming. Unlike counts four and five, the falsity of the denials before the Maryland federal grand jury was beyond dispute. The sharp juxtaposition of defendant's baldly conflicting statements after he had been given every opportunity before the grand jury to tell the truth not only proved willfulness, but made slight the possibility that the jury had resort to the erroneously admitted evidence of legislative acts.

Thus, while we conclude that it might have been preferable for defendant to have been tried on perjury counts six-eight under laboratory conditions which excluded any disclosure of legislative acts, we cannot say that there was sufficient prejudice to defendant by their disclosure to warrant overturning these convictions.

V.

Because we deem the perjury convictions on counts six-eight otherwise valid, we are brought to the question of whether certain tapes and transcriptions of defendant's conversations with Cohen, including the one which occurred in defendant's office in Washington on January 20, 1970, were illegally obtained so as to render them inadmissible in evidence and whether there was any other ground of illegality in the use of this evidence in obtaining

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[22]The jury was fully and correctly instructed as to the law of perjury. They were told to direct their attention to the two statements—to compare them and to convict only if they found beyond a reasonable doubt that the grand jury testimony was a willful material untruth. Additionally, the jury was told that each count of the indictment charged a separate offense and that "[e]ach charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged."

these convictions. First, it is necessary to state additional facts:

Cohen made his arrangement with the United States Attorney for the District of Maryland to make a full, truthful disclosure of his dealings with defendant in exchange for immunity on December 30, 1969. Thereafter, he embarked upon a program of active cooperation with the United States Attorney and the FBI.

On January 12, 1970, he placed a long distance call from Baltimore to defendant's office in the District of Columbia. With Cohen's consent, the call was monitored by an agent of the FBI, but it was not recorded. Cohen was unable to reach defendant, but he obtained several telephone numbers where defendant could be reached.

The following day, attorneys for the government sought and obtained an order from the United States District Court for the District of Maryland authorizing the FBI to intercept "by means of electronic devices to be placed, with the consent of Nathan Cohen, on his person and on telephones utilized by him, conversations, telephonic or in person . . ." between Cohen and defendant. The order was limited to a ten-day period. As soon as the order was obtanied, Cohen placed a call to defendant in Texas from the offices of the FBI in Baltimore and, with Cohen's consent, their conversation was electronically recorded by the FBI on a cassette recorder. This recording was subsequently admitted into evidence.

On January 19, 1970, Cohen placed a telephone call to defendant's office in the District of Columbia. The call originated in Baltimore and, again with Cohen's consent, the conversation was electronically recorded. This recording was also admitted into evidence. During the conversation between the two, Cohen made an appointment to see defendant in the latter's office in Washington on the next day, January 20.

At the January 20, 1970 meeting, Cohen had permitted the placement on his person of a recording device and the entire conversation between the two was recorded. Subsequently, the recording was transcribed and both the recording and the transcription were admitted into evidence.

On January 22, 1970, the government sought and obtained another order from the district court, again authorizing the use of electronic devices to be placed, with the consent of Cohen, on his person and on telephones utilized by him to record conversations between him and defendant. On January 28, after the entry of the second order, Cohen placed a final call from Baltimore to defendant in the latter's office in the District of Columbia, and with Cohen's consent this conversation was electronically recorded. This recording and a transcript of the conversation were also admitted into evidence.

Defendant's first claim with respect to the recordings and the transcriptions is that his rights under the fourth amendment were violated. We think the complete answer to this contention is United States v. White, 401 U.S. 745 (1971) (plurality opinion), which held that the fourth amendment requires no prior judicial authorization for governmental electronic recording of a private conversation where one of the parties to the conversation has consented to the surveillance. Since Cohen consented to each recording, it follows that each recording and the transcriptions made from same did not violate defendant's fourth amendment rights and were therefore admissible into evidence.

It also follows that we need not consider the validity of the court orders authorizing the recordings. They were sought and obtained prior to the decision in *White*, undoubtedly as a precautionary measure on the part of the government. Since *White* makes clear that no warrant or order is needed, any discussion of whether the district court in Maryland may authorize the recording of a conversation with a party in the District of Columbia or in Texas would be academic.

We reject defendant's argument that Cohen's consent was not freely and voluntarily given since it was extended under the pressure of a potential indictment and in return for a promise of immunity. Three circuits have rejected this argument, United States v. Silva, 449 F.2d 145, 146 (1 Cir. 1971), cert. denied 405 U.S. 918 (1972); United States v. Jones, 433 F.2d 1176 (D.C. Cir. 1970), cert.

denied 402 U.S. 950 (1951); Good v. Unted States, 378 F.2d 934 (9 Cir. 1967), and we agree. United States v. Laughlin, 226 F.Supp. 112 (D. D.C. 1964) cited by defendant, which holds to the contrary, has been superseded by United States v. Jones, supra.

Defendant cites no authority, and we are aware of none, indicating that the recording and transcription of a Congressman's conversations violate the constitutional principle of the separation of powers. We also reject defendant's suggestion that in the exercise of our supervisory power over district courts we should suppress consensual electronic surveillance as "dirty business." Cf. McNabb v. United States, 318 U.S. 332 (1943). The Supreme Court has considered and rejected this very argument on at least two occasions. Lopez v. United States, 373 U.S. 427, 440 (1963); OnLee v. United States, 343 U.S. 747, 754-58 (1952). See also Osborn v. United States, 385 U.S. 323 (1966).

Finally, we have examined the record in detail and we can find no support for defendant's argument that he was entrapped by the United States Attorney in testifying before the grand jury, where he denied the conversations which had been recorded. The essence of the crime of perjury is a willful tuntruth, under oath, in a material statement. While the United States Attorney, by inviting defendant to testify before the grand jury, may have provided defendant with the opportunity to commit perjury, the record is absolutely devoid of any evidence that the United States Attorney suggested what defendant should say when he testified. Legally, as well as factually, there was no entrapment. Certainly there was no obligation on the part of the United States Attorney to advise the defendant of evidence which the former had in his possession or of which he was aware. See United States v. Winter, 348 F.2d 204 (2 Cir.), cert. denied 382 U.S. 955 (1965); LaRocca v. United States, 337 F.2d 39 (8 Cir. 1964).

REVERSED AS TO COUNTS ONE THROUGH FIVE AND NEW TRIAL GRANTED;

AFFIRMED AS TO COUNTS SIX THROUGH EIGHT.

Appendix

SUMMARY OF THE INDICTMENT

The first count of the indictment and the new matter alleged in the second count read as follows:

The Grand Jury for the District of Maryland charges:

1. At all times hereinafter mentioned, JOHN DOWDY was a Member of the House of Representatives of the United States of America. He represented the Seventh Congressional District of Texas in the Eighty-Second through the Eighty-Ninth Congresses and represented the Second Congressional District of Texas in the Ninetieth and Ninety-First Congresses.

2. At all times hereinafter mentioned, the Department of Justice was a Department of the United States, created, organized and existing by virtue of Chapter 150 of 16 Stat. 162, entitled "An Act to establish the Department of Justice," enacted by the Congress of the United States on June 22, 1870, and charged with the responsibility of enforcing the laws of the United States.

3. Monarch Construction Corporation was a Maryland corporation with offices at 10111 Colesville Road, Silver Spring, Maryland from on or about May 1, 1963 to on or about October 5, 1965.

4. MYRVIN C. CLARK was Sales Manager of Monarch Construction Corporation from on or about May 1, 1963 to on or about October 5, 1965.

5. Nathan H. Cohen was President of Monarch Construction Corporation from on or about May 1, 1963 to on or about October 5, 1965.

6. From on or about August 1, 1965 to on or about December 10, 1969,

JOHN DOWDY

and

MYRVIN C. CLARK

herein named as defendants, together with Nathan H. Cohen, herein named as a co-conspirator but not indicted, and with other persons, did unlawfully, willfully and knowingly combine, conspire, confederate and agree together and with each other within the State and District of Maryland and elsewhere to commit offenses against the United States, to wit, that otherwise than as provided by law for the proper discharge of official duties, JOHN DOWDY would, directly and indirectly, receive from Nathan H. Cohen and MYRVIN C. CLARK, and Nathan H. Cohen and MYRVIN C. CLARK would knowingly, directly and indirectly, give to JOHN DOWDY, compensation for services rendered and to be rendered by JOHN DOWDY and others in relation to a proceeding, request for a determination, controversy, charge, accusation and other particular matter in which the United States was a party and had a direct and substantial interest, before a department, agency and officer; said proceeding was an investigation then pending before the Department of Justice, and in the office of the United States Attorney for the District of Columbia, concerning possible violations of criminal statutes of the United States and the District of Columbia by Monarch Construction Corporation, Nathan H. Cohen, MYRVIN C. CLARK and others associated with the business and affirs of Monarch Construction Corporation; all in violation of Sections 203(a) and (b) of Title 18 of the United States Code.

OVERT ACTS

In pursuance of and in order to effect the objects of the aforesaid conspiracy, the defendants and co-conspirators did do and perform numerous overt acts, including the following, to wit:

(1) Between on or about August 1, 1965 and on or about September 22, 1965, in the District of Maryland, the defendant MYRVIN C. CLARK and Nathan H. Cohen met and agreed that the defendant MYRVIN C. CLARK would approach the defendant JOHN DOWDY with the suggestion that the defendant JOHN DOWDY arrange for Nathan H. Cohen to appear before a Congressional com-

mittee, testify concerning his relationship to the business and affairs of Monarch Construction Corporation and thereby gain immunity from prosecution.

(2) Between on or about August 1, 1965 and on or about September 22, 1965, in the District of Columbia, the defendant MYRVIN C. CLARK and the defendant JOHN DOWDY met and discussed the possibility of the defendant JOHN DOWDY, in return for a payment to the defendant JOHN DOWDY of $25,000, assisting Nathan H. Cohen in securing immunity from prosecution by testifying before a Congressional committee.

(3) Between on or about August 1, 1965 and on or about September 22, 1965, in the District of Maryland, the defendant MYRVIN C. CLARK met with Nathan H. Cohen and reported to him concerning the meeting and discussion between the defendant MYRVIN C. CLARK and the defendant JOHN DOWDY described in Overt Act (2) above.

(4) Between on or about August 1, 1965 and on or about September 22, 1965, in the District of Columbia, the defendant JOHN DOWDY and Nathan H. Cohen met and agreed that the defendant JOHN DOWDY, in return for a payment to the defendant JOHN DOWDY of $25,000, would arrange for Nathan H. Cohen to appear before a Congressional committee and testify concerning Nathan H. Cohen's relationship to the business and affairs of Monarch Construction Corporation.

(5) On or about September 16, 1965, in the District of Columbia, Nathan H. Cohen caused a letter, with enclosures, to be sent to the defendant JOHN DOWDY and other members of the Committee on the District of Columbia of the House of Representatives, charging "persecution", "duress and coercion" and "abuse of authority" allegedly directed against Monarch Construction Corporation, Nathan H. Cohen and others by government officials.

(6) Between on or about August 1, 1965 and on or about September 22, 1965, in the District of Maryland, the defendant MYRVIN C. CLARK had a telephone conver-

sation with the defendant JOHN DOWDY during which arrangements were made to make a payment of $25,000 to the defendant JOHN DOWDY at Atlanta Airport, Atlanta, Georgia.

(7) Between on or about August 1, 1965 and on or about September 22, 1965, in the District of Maryland, the defendant MYRVIN C. CLARK and Nathan H. Cohen met and discussed the transportation of $25,000 in cash to Atlanta Airport, Atlanta, Georgia.

(8) On or about September 21, 1965, in the District of Maryland, Nathan H. Cohen caused $5,000 to be withdrawn from the Savings Bank of Baltimore in Baltimore.

(9) On or about September 21, 1965, in the District of Maryland, Nathan H. Cohen caused $9,200 to be withdrawn from the Montgomery Savings Association of Kensington, Maryland.

(10) On or about September 22, 1965, in the District of Maryland, Nathan H. Cohen caused $7,000 to be borrowed from the Uptown Federal Savings and Loan Association in Baltimore.

(11) On or about September 22, 1965, in the District of Maryland, Nathan H. Cohen caused $4,200 to be borrowed from the Central National Bank of Maryland.

(12) On or about September 22, 1965, in the District of Maryland, Nathan H. Cohen and others packed $25,000 in cash in a briefcase.

(13) On or about September 22, 1965, in the District of Maryland, Nathan H. Cohen and others prepared a list of serial numbers of paper currency then being packed in the briefcase as described in Overt Act (12) above.

(14) On or about September 22, 1965, in the District of Maryland, the defendant MYRVIN C. CLARK departed for Atlanta, Georgia.

(15) On or about September 22, 1965, in the District of Maryland, Nathan H. Cohen caused the briefcase containing $25,000 in cash, as described in Overt Act (12)

above, to be transported from Maryland to Atlanta Airport, Atlanta, Georgia.

(16) On or about September 22, 1965, the defendant JOHN DOWDY travelled from the District of Columbia to Atlanta Airport, Atlanta, Georgia.

(17) On or about September 22, 1965, at Atlanta Airport, Atlanta, Georgia, the defendant MYRVIN C. CLARK transferred possession of the briefcase containing $25,000 in cash, as described in Overt Act (12) above, to the defendant JOHN DOWDY.

(18) Between on or about September 23, 1965 and on or about November 1, 1965, in the District of Columbia, the defendant JOHN DOWDY and Nathan H. Cohen discussed the possibility of the defendant JOHN DOWDY taking steps, other than arranging for the appearance of Nathan H. Cohen as a witness before a Congressional committee as described in Overt Act (4) above, designed to prevent, or to reduce the likelihood of, the prosecution of Nathan H. Cohen.

(19) On or about October 13, 1965, in the District of Columbia, the defendant JOHN DOWDY caused to be issued a subpoena directed to an official of the District of Columbia Department of Licenses and Inspections commanding the production of certain documents before Subcommittee Number 4 of the Committee on the District of Columbia of the United States House of Representatives.

(20) Between on or about October 1, 1965 and on or about October 25, 1965, in the District of Columbia, the defendant JOHN DOWDY caused a request to be made to an Assistant United States Attorney for the District of Columbia to meet with the defendant JOHN DOWDY in his congressional office.

(21) Between on or about October 1, 1965 and on or about October 25, 1965, in the District of Columbia, the defendant JOHN DOWDY met with an Assistant United States Attorney for the District of Columbia in the defendant JOHN DOWDY's congressional office and inquired of him about an investigation then pending before

the Department of Justice, and in the office of the United States Attorney for the District of Columbia, concerning possible violations of criminal statutes by Nathan H. Cohen, Monarch Construction Corporation and others.

(22) On or about October 22, 1965, in the District of Columbia, the defendant JOHN DOWDY met in his congressional office with officials of the Federal Housing Administration (FHA) and discussed with them an investigation which had been conducted by the Housing and Home Finance Agency (HHFA) concerning the Monarch Construction Corporation, Nathan H. Cohen and others.

(23) On or about October 22, 1965, in the District of Columbia, the defendant JOHN DOWDY received and accepted from officials of the FHA, HHFA files reflecting an investigation which had been conducted by HHFA concerning Monarch Construction Corporation, Nathan H. Cohen and others.

(24) Between on or about October 22, 1965 and on or about December 31, 1965, in the District of Columbia, the defendant JOHN DOWDY made available to the defendant MYRVIN C. CLARK the HHFA files referred to in Overt Act (23) above.

(25) Between on or about October 22, 1965 and on or about December 31, 1965, in the District of Maryland, the defendant MYRVIN C. CLARK photocopied the HHFA files referred to in Overt Act (23) above.

(26) Between on or about October 22, 1965 and on or about December 31, 1965, in the District of Maryland, the defendant MYRVIN C. CLARK gave to Nathan H. Cohen photocopies of the HHFA files referred to in Overt Act (23) above.

(27) Between on or about October 13, 1965 and on or about December 31, 1965, in the District of Columbia, the defendant JOHN DOWDY furnished and caused to be furnished to Nathan H. Cohen photocopies of the documents referred to in Overt Act (19) above.

(28) On or about October 25, 1965, in the District of Columbia, the defendant JOHN DOWDY sent a letter

addressed to the United States Attorney's office for the District of Columbia.

(29) On or about October 25, 1965, in the District of Columbia, the defendant JOHN DOWDY sent a letter addressed to an official of the FHA.

(30) Between on or about May 1, 1967 and on or about September 1, 1967, in the District of Columbia, the defendant JOHN DOWDY and Nathan H. Cohen met and discussed the status of the investigation then pending in the Department of Justice, and in the office of the United States Attorney for the District of Columbia, concerning possible violations of criminal statutes by Nathan H. Cohen, Monarch Construction Corporation and others.

(31) Between on or about May 1, 1969 and on or about June 5, 1969, in the District of Columbia, the defendant MYRVIN C. CLARK made a telephone call to the defendant JOHN DOWDY.

(32) Between on or about May 1, 1969 and on or about June 5, 1969, in the District of Columbia, the defendants JOHN DOWDY and MYRVIN C. CLARK met with Nathan H. Cohen.

(33) Between on or about May 1, 1969 and on or about June 5, 1969, in the District of Columbia, the defendant MYRVIN C. CLARK discussed with Nathan H. Cohen the payment of $5,000 by and on behalf of Nathan H. Cohen to the defendant JOHN DOWDY.

(34) Between on or about May 1, 1969 and on or about June 6, 1969, in the District of Maryland, Nathan H. Cohen had a telephone conversation with the defendant JOHN DOWDY during which the defendant JOHN DOWDY suggested that Nathan H. Cohen consult with Hugh J. McGee, a Washington attorney.

(35) Between on or about May 1, 1969 and on or about June 6, 1969, in the District of Columbia, Nathan H. Cohen had a telephone conversation with Hugh J. McGee.

(36) Between on or about May 1, 1969 and on or about June 6, 1969, in the District of Columbia, the defendant MYRVIN C. CLARK, Nathan H. Cohen and Hugh J. McGee met in the office of Hugh J. McGee.

(37) Between on or about May 1, 1969 and on or about June 30, 1969, in the District of Columbia, the defendant JOHN DOWDY and Nathan H. Cohen met and discussed the payment of $5,000 by and on behalf of Nathan H. Cohen to the defendant JOHN DOWDY.

(38) Between on or about May 1, 1969 and on or about June 30, 1969, in the District of Columbia, Nathan H. Cohen met with Hugh J. McGee at the office of Hugh J. McGee.

(39) Between on or about May 1, 1969 and on or about June 30, 1969, in the District of Columbia, Nathan H. Cohen, with the permission of Hugh J. McGee, overheard a telephone conversation between Hugh J. McGee and Oliver O. Dibble, a Department of Justice attorney assigned to the office of the United States Attorney for the District of Columbia.

(40) On or about June 6, 1969, in the District of Columbia, Nathan H. Cohen gave to Hugh J. McGee check No. 1044, dated June 6, 1969, drawn on the Equitable Trust Company, Baltimore, Maryland, payable to Hugh J. McGee in the amount of $2,500.

(41) On or about June 10, 1969, in the District of Maryland, Nathan H. Cohen caused the check described in Overt Act (40) above to be paid by the Equitable Trust Company, Baltimore, Maryland.

(42) Between on or about May 1, 1969 and on or about July 30, 1969, in the District of Columbia, the defendant JOHN DOWDY met with Nathan H. Cohen.

(43) On or about June 20, 1969, in the State of New Jersey, Nathan H. Cohen sent to Hugh J. McGee check No. 1050, dated June 20, 1969, drawn on the Equitable Trust Company, Baltimore, Maryland, payable to Hugh J. McGee in the amount of $500.

(44) On or about July 1, 1969, in the District of Maryland, Nathan H. Cohen caused the check described in Overt Act (43) above to be paid by the Equitable Trust Company, Baltimore, Maryland.

(45) Between on or about May 1, 1969 and on or about July 30, 1969, in the District of Columbia, the defandant JOHN DOWDY met with Hugh J. McGee and Oliver O. Dibble.

18 USC § 371

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

1. The Grand Jury realleges paragraphs (1) through (5), inclusive, of Count One of this indictment and incorporates them herein by reference.

2. From on or about August 1, 1965 to on or about December 10, 1969,

JOHN DOWDY

and

MYRVIN C. CLARK

herein named as defendants, together with Nathan H. Cohen, herein named as a co-conspirator but not indicted, and with other persons, did unlawfully, willfully and knowingly combine, conspire, confederate and agree together and with each other within the State and District of Maryland and elsewhere to commit an offense against the United States, to wit, that JOHN DOWDY would corruptly influence, obstruct, and impede and would corruptly endeavor to influence, obstruct, and impede the due and proper administration of the law under which a proceeding was then being had before a department of the United States; said proceeding was an investigation then pending before the Department of Justice, and in the office of the

United States Attorney for the District of Columbia, concerning possible violations of criminal statutes of the United States and the District of Columbia by Monarch Construction Corporation, Nathan H. Cohen, MYRVIN C. CLARK and others associated with the business and affairs of Monarch Construction Corporation; all in violation of Section 1505 of Title 18 of the United States Code.

The overt acts then alleged in the second count are identical to those alleged in the first count.

In the third count, defendant, together with Myrvin C. Clark, was charged with traveling in interstate commerce from Maryland to Georgia, and causing to move in interstate commerce between those places the sum of $25,000 in cash, with intent to accomplish the bribery of defendant.

Counts Four through Eight all charged perjury before a Grand Jury for the District of Maryland on March 4, 1970; each count being based upon a separate allegedly material false statement. In Count Four, the actionable statement of defendant was his denial that he met Clark in an airport in Atlanta, Georgia on or about September 22, 1965. Count Five assigned as perjury defendant's denial that he received $25,000 in cash at this meeting with Clark.

Counts Six through Eight assigned as perjury defendant's Grand Jury testimony concerning conversations with Cohen which occurred in January, 1970. Count Six was the denial that defendant had told Clark that Cohen's prospective prosecution would have to be "handled" in a way other than obtaining Congressional immunity for Cohen and that if it had not been for defendant's efforts, Cohen would have already been prosecuted. Count Seven alleged as willfully untrue defendant's denial that Cohen had said to him that defendant had been paid $25,000 by Cohen and that the payment had "done its job." Count Eight alleged as criminally actionable defendant's denial that he had sought to assist Cohen by determining the

status of an investigation of Monarch pending before the Department of Justice and in the office of the United States Attorney for the District of Columbia and that he had expressed the hope that he could "do something" for Cohen in regard to the investigation.

FILED
April 27, 1973
William K. Slate, II
CLERK

Appendix C

COURT OF APPEALS ORDER

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1614

United States of America,

Appellee,

vs.

John Dowdy,

Appellant.

ORDER

Defendant's petition for rehearing having been read and considered, it is, with the concurrence of Judge Russell and Judge Widener, ORDERED that:

1. Said petition be, and it is hereby, denied.
2. The opinion heretofore announced on March 12, 1973, be, and it is hereby modified in the following respects:
   a. An additional sentence is hereby added to the text at the end of p. 38, to read:
      The instant case is quite unlike United States v. Beach, 296 F.2d 153 (4 Cir. 1961), because *Beach* did not prescribe an inflexible rule and the rule of *Beach* should not be applied where

the types of perjury are clearly different, where the proof as to some is overwhelming, and where the likelihood that a defendant was prejudiced because a jury was permitted improperly to conclude guilt on some was highly remote.

b. Footnote 22, pp. 37-38 of the slip opinion be, and it is hereby, stricken and a new footnote 22 be added to read as follows:

The jury was fully and correctly instructed as to the law of perjury. Although the district court instructed the jury to apply the rule requiring a witness and corroboration—the "two-man" rule—with respect to perjury, notwithstanding that there was a record of what defendant had said on each of two occasions (cf. United States v. Wood, 14 Pet. 430, 437, 441 (1840)), the jury's attention was directed to the tapes and transcriptions of the conversations with Cohen and to the transcript of the grand jury testimony. The jury was told to convict only if they found beyond a reasonable doubt that the grand jury testimony was a willful material untruth. Additionally, the jury was told that each count of the indictment charged a separate offense and that "[e]ach charge and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged." As stated in the text, we think that under the circumstances of this case the quoted language should be given greater effect than in United States v. Beach, supra.

For the Court:
s/ Harrison L. Winter
United States Circuit Judge

A True Copy, Teste:
William K. Slate, II, Clerk
s/ Sharon Grubb
Deputy Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1584

JOHN DOWDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on March 12, 1973. A petition for rehearing (Pet. App. C) was denied on April 27, 1973. The petition for a writ of certiorari was filed on May 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights or the doctrine of separation of powers was violated when a government informer, who had consented to the placement on his person of a tape recorder, obtained oral admissions from petitioner during a meeting in petitioner's congressional office.

2. Whether petitioner's convictions on three perjury counts, which did not depend on evidence of legislative acts, were tainted by the admission at trial of evidence relating to other counts of the indictment, which allegedly concerned legislative acts protected from judicial inquiry under the Speech or Debate Clause of the Constitution.

3. Whether the government's evidence failed to satisfy a "two-witness" rule applicable to perjury prosecutions.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner, then a member of the United States House of Representatives from Texas, was convicted on eight counts of an indictment charging him with conspiracy to accept unlawful compensation, in violation of 18 U.S.C. 203 and 371 (Count I); conspiracy to obstruct a proceeding pending before the Department of Justice, in violation of 18 U.S.C. 1505 and 371 (Count II); unlawful travel in interstate commerce in order to facilitate bribery, in violation of 18 U.S.C. 201 and 1952 (Count III); and perjury, in violation of 18 U.S.C. 1621 (Counts IV-

VIII).[1] Petitioner was sentenced to prison terms, concurrent in part and consecutive in part, aggregating eighteen months, and fined a total of $25,000. The court of appeals reversed the convictions on Counts I–V, holding that proof of these counts had depended on evidence of legislative acts protected from judicial inquiry by the Speech or Debate Clause of the Constitution, Article I, Section 6 (Pet. App. B, pp. 10a–22a). This left in effect concurrent six-month sentences on Counts VI, VII, and VIII, plus a fine of $1,000 on each count. The United States has petitioned for a writ of certiorari to review the portion of the decision of the court of appeals reversing the convictions on Counts I–V (No. 72–1529, filed May 11, 1973).

The relevant facts, as established at trial and set forth in the opinion of the court below (Pet. App. B, pp. 5a–10a, 24a–25a), are as follows:

In 1965, the Investigations Subcommittee of the House Committee on the District of Columbia, of which petitioner was Chairman, had conducted investigations of urban renewal within the District of Columbia. The Monarch Construction Corporation was at that time under investigation by various federal and local agencies in connection with home improvement frauds. The president of Monarch, Nathan Cohen, sought petitioner's assistance in preventing a prosecution. Petitioner agreed to accept $25,000 to "handle" the matter. Thereafter, on September 22, 1965, petitioner and Cohen's sales manager, Myrvin

[1] A co-defendant, Myrvin C. Clark, charged in Counts I–III, pleaded guilty to Count III and was sentenced to five years' probation.

Clark, traveled separately to the Atlanta, Georgia, airport, where Clark handed petitioner an attache case containing $25,000 in cash. Petitioner subsequently met with Justice Department officials on Cohen's behalf, later explaining to Clark that "it was all taken care of" (Pet. App. B, pp. 8a–9a). When Monarch was again under grand jury scrutiny in 1967, Cohen and Clark offered petitioner $5,000 more to avoid prosecution. Petitioner referred Cohen to an attorney who agreed to "fix" the case for $30,000, and petitioner met with the attorney and the prosecutor at Cohen's request.

In 1969, Cohen became the subject of an investigation in Maryland on unrelated charges. In exchange for immunity, he disclosed to the United States Attorney his dealings with petitioner and agreed to cooperate with law enforcement agents. Cohen consented to allow the FBI to monitor his telephone conversations with petitioner, and he permitted a recording device to be placed on his person to record the conversation during a meeting with petitioner. The government had also obtained court orders authorizing the use of electronic devices to intercept and record these conversations. During a meeting in petitioner's office on January 20, 1970, Cohen encouraged petitioner to discuss their previous dealings. Petitioner told Cohen that he [Cohen] would have been prosecuted except for petitioner's efforts, that Cohen's $25,000 payment had "done its job," and that petitioner had interceded with the Department of Justice on Cohen's behalf (Pet. App. B, pp. 10a, 24a–25a).

On February 20, 1970, the United States Attorney for the District of Maryland wrote petitioner a letter advising him that a special grand jury was investigating possible bribery, obstruction of justice, and conspiracy by petitioner and others in relation to the affairs of the Monarch Construction Corporation. The letter invited petitioner to appear before the grand jury (Transcript of March 4, 1970, pp. 4–6).[2] Petitioner accepted the invitation and attended a grand jury session on March 4, 1970. He was warned against the consequences of perjury (*id.* at 8). In response to questions, he denied having met Clark at the Atlanta airport in September 1965 and having received $25,000 from Clark. These denials formed the basis for perjury Counts IV and V of the indictment. Petitioner also denied having told Cohen or having been a party to statements to the effect that he [petitioner] had helped Cohen avoid prosecution, that he had received $25,000 and that the payment had "done its job," or that he had interceded with the Department of Justice on Cohen's behalf (*id.* at 80–83). These denials, which were flatly contradicted by the tape recording of January 20, 1970, were assigned as perjury in Counts VI–VIII.

The court of appeals reversed petitioner's convictions for conspiracy and for unlawful travel to facilitate bribery (Counts I–III), holding that proof of those charges had depended in part on evidence of legislative acts protected from judicial inquiry under

[2] We are lodging a copy of the transcript of the grand jury proceedings with the Clerk.

the Speech or Debate Clause. Perjury Counts IV and V (the denials that petitioner had met Clark and had received $25,000) were also reversed on the ground that the jury might have considered evidence of legislative acts in reaching their verdict on those charges as well (Pet. App. B, p. 22a). The court of appeals held, however, that Counts VI–VIII "stand on a different footing. * * * The sharp juxtaposition of defendant's baldly conflicting statements after he had been given every opportunity before the grand jury to tell the truth not only proved willfulness, but made slight the possibility that the jury had resort to the erroneously admitted evidence of legislative acts" (Pet. App. B, pp. 22a–23a). Convictions on these remaining counts were therefore affirmed.

ARGUMENT

1. Petitioner contends that the use of an informer to obtain incriminating statements from a member of Congress violated the Fourth Amendment and the concept of the separation of powers, and that such tactics represent overzealous law enforcement. These claims are without merit.

a. Petitioner contends that the government was responsible for an unlawful intrusion, in violation of the Fourth Amendment, when Nathan Cohen met with petitioner in the latter's congressional office suite, equipped with an electronic device to record their conversation. The court of appeals, relying on *United States* v. *White,* 401 U.S. 745, correctly rejected this argument. *White* reiterated this Court's long-standing position that the use of informants is a proper law

nforcement technique, and held that there is no distinc-on in terms of Fourth Amendment protection be-ween an informant who uses electronic devices to ansmit or record his conversations with the suspect nd one who does not. *United States* v. *White, supra,* 01 U.S. at 752–753; *Lopez* v. *United States,* 373 U.S. 27, 438. See also *On Lee* v. *United States,* 343 U.S. 47, 756.

It is clear also that petitioner was not relying, as e implies (Pet. 10), on the "sanctity" of his congres-ional office, but on his misplaced confidence that his dmissions to Cohen would not be revealed to the author-ies. Such reliance is not protected by the Fourth mendment. *Hoffa* v. *United States,* 385 U.S. 293, 02; *Lewis* v. *United States,* 385 U.S. 206, 210–211. Cohen's presence in petitioner's office was neither fur-ive nor uninvited. He in no way invaded petitioner's rivacy.[3] Cohen took nothing from petitioner's office xcept a permanent record of statements that peti-ioner had knowingly made to him during their meet-ng. *Lopez* v. *United States, supra,* 373 U.S. at 438. Petitioner was subject to the risk that the person in whom he confided regarding his illegal activities might e acting in cooperation with a law enforcement agen-y. *United States* v. *White, supra,* 401 U.S. at 752. Nor, as the court of appeals noted (Pet. App. B, p. 5a), was Cohen's consent to the tape recording viti-ted by the fact that he anticipated immunity from rosecution as a result of his cooperation with the Jnited States Attorney. *United States* v. *Silva,* 449

[3] Compare *Gouled* v. *United States,* 255 U.S. 298.

F. 2d 145, 146 (C.A. 1), certiorari denied, 405 U.S. 918; *United States* v. *Jones*, 433 F. 2d 1176, 1180-1181 (C.A. D.C.), certiorari denied, 402 U.S. 950; *Good* v. *United States*, 378 F. 2d 934, 936 (C.A. 9).

Petitioner's reliance on *Weiss* v. *United States*, 308 U.S. 321, is wholly misplaced. In *Weiss*, a telephone conversation was electronically intercepted, and the contents were transcribed and divulged to government agents and prosecutors without the knowledge or consent of either party, in apparent contravention of Section 605 of the Communications Act of 1934, 48 Stat. 1064, 1103. Thereafter, some of the suspects were confronted with this evidence, which persuaded them to plead guilty, consent to the use of the transcripts, and testify for the government. The Court rejected this bootstrap method of obtaining consent to divulge an intercepted conversation. In the instant case, however, Cohen's cooperation with the authorities resulted from his knowledge that the government had independent evidence of his wrongdoing. His consent was obtained before the recorded conversation took place. There was, moreover, no violation of the Communications Act.

b. Petitioner argues (Pet. 10) that the principle of separation of powers is transgressed when an agency of the executive branch of the government causes the electronic recording of a legislator's conversation with a United States citizen. As the court of appeals noted, no legal authority supports this unique proposition (Pet. App. B, p. 26a).[4] In *United States* v. *United*

[4] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 593-594 (Frankfurter, J., concurring), which concerns the seizure of a steel mill, has no bearing on this question.

States District Court, 407 U.S. 297, cited by petitioner, this Court decided the narrow question whether the executive branch may conduct nonconsensual electronic surveillance without judicial approval when it believes there is a domestic threat to national security. That decision is wholly unrelated to any issue presented by the instant case. Here, the recordings were made with the consent of a party to the conversation, and prior judicial approval was sought and obtained as an extra precaution (Pet. App. B, pp. 24a–25a). Moreover, petitioner has failed to show why, as a member of Congress, he stands on a different footing from other citizens, when participating in activities not protected by the Speech or Debate Clause, insofar as investigative methods are concerned. Since legislators are subject to criminal penalties for offenses committed during their terms of office, there is no basis for concluding that they are immune from evidence-gathering techniques which have been approved by this Court.

c. Petitioner also contends (Pet. 11) that the government was guilty of "overzealous law enforcement" and that he was entrapped into perjuring himself before the grand jury. However, the investigative method used was in no way unscrupulous. The government had obtained Cohen's consent to the recording of his conversations with petitioner and had taken the extra precaution of obtaining a court order authorizing the use of electronic devices for this purpose. The object of such investigations is almost always to obtain and preserve incriminating statements by the suspect for

use in possible future prosecutions; there is no impropriety or "overzealousness" in this practice.

Nor was entrapment involved in the instant case. Undoubtedly, petitioner was encouraged by Cohen to make damaging admissions during their meeting on January 20, 1970. These admissions, however, were not themselves illegal acts, but rather references to acts previously committed by the petitioner—acts that the government had in no way encouraged. Prior to testifying before the grand jury, petitioner was carefully warned that he was under suspicion of corruption, and he was also warned against perjury (Transcript of March 4, 1970, pp. 4–6, 8). Thus, if the government encouraged him to do anything, it was to tell the truth. Petitioner perjured himself *despite* the government's precautions, not *because* of them. We note also that petitioner appeared voluntarily before the grand jury, in response to an invitation.

Obviously, then, there is no reason to invoke this Court's supervisory power to reverse petitioner's convictions on Counts VI–VIII. That power is one which "must be sparingly exercised," and its application "where there has been no manifestly improper conduct by federal officials, would be wholly unwarranted." *Lopez* v. *United States, supra,* 373 U.S. at 440. See also *United States* v. *Jones, supra,* 433 F. 2d at 1181–1182.

2. Petitioner contends that the court of appeals erred in distinguishing perjury Counts IV and V from Counts VI–VIII with regard to the effect of inadmissible evidence upon the jury's deliberations. The

court below pointed out (Pet. App. B, p. 22a) that to find petitioner guilty of perjury in his denial of the 1965 meeting in Atlanta and his receipt of a $25,000 payment at that meeting (Counts IV and V), it was necessary to consider the same evidence required for convictions on Counts I–III, offenses which the court found were proved by evidence of legislative acts.

While it is our position that petitioner's conviction on all counts was properly obtained without the use of evidence protected under the Speech or Debate Clause,[5] we agree with the court below that, in any event, such evidence could have played no significant role in petitioner's conviction on Counts VI–VIII. As the court of appeals noted (Pet. App. B, p. 23a), to convict petitioner on Counts VI–VIII, the jury need only have compared petitioner's grand jury testimony with Cohen's testimony and with the recording of petitioner's January 20 meeting with Cohen. The contradiction between petitioner's two statements and the proof of the falsity of his grand jury testimony were so overwhelming as to preclude any inference other than that of guilt. There was no need for the jury to consider other evidence in the case; thus, the instant case differs in this respect from *United States* v. *Johnson*, 337 F. 2d 180 (C.A. 4), affirmed, 383 U.S. 169.

We note also that the jury was carefully instructed to distinguish the evidence as to each count:

> A separate crime or offense is charged in each count of the indictment. Each charge and

[5] See our pending petition for a writ of certiorari, No. 72-1529, *United States* v. *Dowdy*, filed May 11, 1973.

> the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged. [Transcript of December 29, 1971, pp. 46–47.]

Under these circumstances, the error, if any, in permitting the jury to consider Counts VI–VIII along with Counts I–V was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24.

3. Petitioner contends that the government's proof at trial violated the "two-witness" rule for perjury prosecutions, since the falsity of the statements which formed the basis for Counts VI–VIII was established by the testimony of only one witness, Nathan Cohen, corroborated by the introduction of the recording of Cohen's conversation with petitioner on January 20, 1970. In petitioner's view, the tape recording represents another unsworn statement by Cohen and cannot therefore be used to corroborate Cohen's in-court testimony (Pet. 16).

It is obvious, however, that petitioner's own words on the tape recording, as well as Cohen's, constitute "corroboration" for Cohen's testimony.[6] As this Court long ago established, it is not necessary for the government to produce two witnesses in court to testify to the perjury; it is sufficient that one witness be corroborated by circumstantial evidence; indeed, in some cases perjury may be proved without any human witness, solely on the strength

[6] Petitioner has not challenged the authenticity or accuracy of the tape recordings.

of the defendant's own provable statements. *United States* v. *Wood,* 14 Pet. 430, 439, 441. The purpose of the "two-witness" rule is to avoid pitting one oath against another without other evidence. *United States* v. *Wood, supra,* 14 Pet. at 437–439, and authorities there cited; *Hammer* v. *United States,* 271 U.S. 620, 627. To be distinguished are situations such as that in the instant case, where the very words of the accused have more probative value in proving the crime than would the testimony of innumerable other witnesses. See *Hammer* v. *United States, supra.* It is difficult to conceive of better corroboration for Cohen's in-court testimony than the words of petitioner, preserved on magnetic tape, making the very statements which he later denied under oath.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1973.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN DOWDY, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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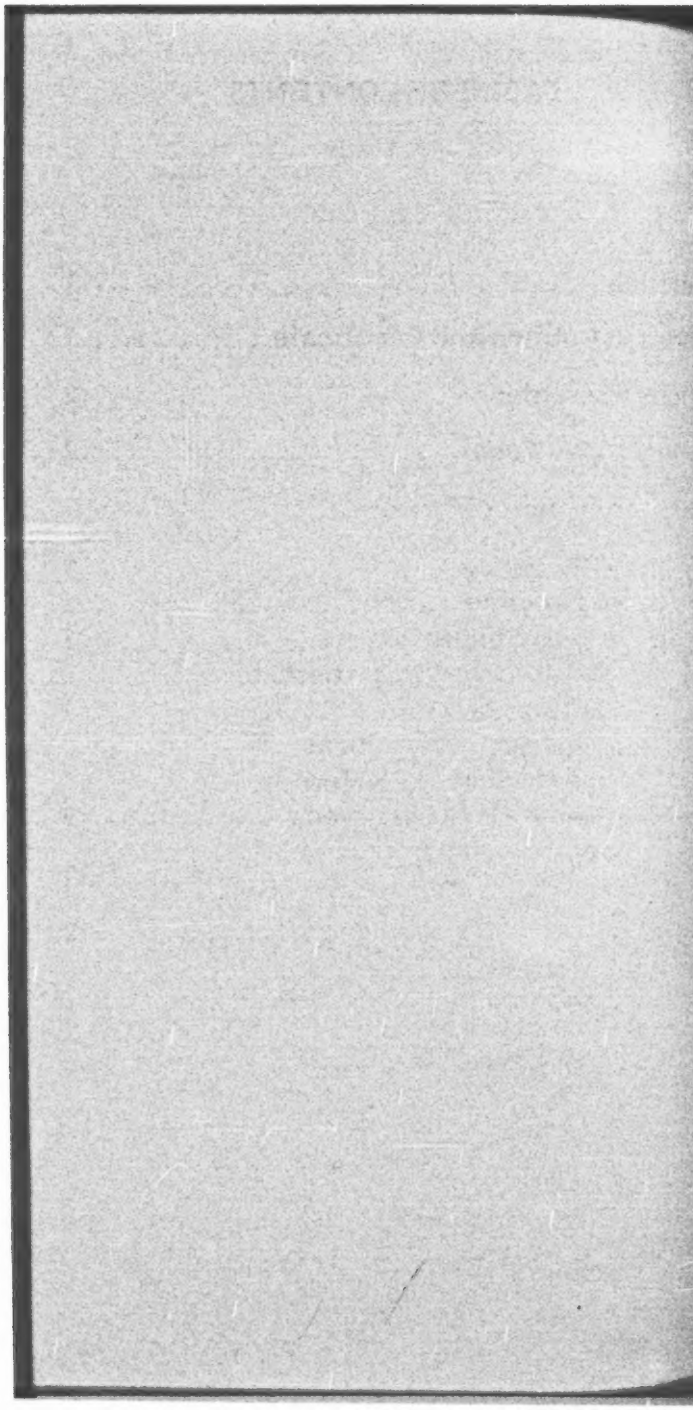

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NO. 72-1584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JOHN DOWDY, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR REHEARING

ON

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Petitioner, John Dowdy, respectfully petitions this Honorable Court under Rule 58, Paragraph 2, Supreme Court Rules, within the enlarged time prescribed by said Rule, for rehearing of his Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, invoking the jurisdiction of this Court under 28 U. S. C. 1254 (1), such writ having been denied on October 9, 1973, and in support of said Petition for Rehearing shows:

GROUNDS FOR PETITION AND CERTIFICATE

This Petition is based on substantial grounds available to

Petitioner which have not been previously presented in his behalf. Petitioner, pro se, and his undersigned counsel certify that this Petition is presented in good faith and not for delay, and is restricted to such substantial grounds, as presented by the following questions:

QUESTIONS PRESENTED

1. Whether a conviction may stand where there is no evidence to support same.

2. Whether a conviction of perjury in violation of 18 U. S. C. 1621 may stand where there is no pleading in the indictment of testimony contrary to the alleged perjured statement.

3. Whether a conviction of perjury in violation of 18 U. S. C. 1621 meets the two witness rule where same is based upon the uncorroborated testimony of a single witness.

4. Whether a conviction of perjury in violation of 18 U. S. C. 1621 may stand when perjury was knowingly used in obtaining conviction.

5. Whether the tape recording of the January 28, 1970 conversation should be suppressed for failure to observe the rules and procedures which had theretofore been established by the Attorney General.

STATEMENT OF THE CASE

Pertinent to this motion, Petitioner was convicted in the United States District Court for the District of Maryland on Counts Six (6), Seven (7) and Eight (8) for perjury in violation of 18 U. S. C. 1621 (A. pp. 32-43).

The Grand Jury testimony introduced in evidence (Tr. pp. 1690-1717), insofar as relevant here, is the same as copied in each of the third numbered paragraphs of Counts Six (6), Seven (7) and Eight (8).

Cohen was the single witness to testify to the alleged perjury. His entire testimony of the conversation of January 20, 1970, is at pages 24 and 25 of the Trial Transcript for November 11, 1971.

The prosecution's transcript of the January 20, 1970 tape

hich is relied upon for corroboration of the single witness stimony is found at pages 399-406 of the Appendix.

The tape recording is government Exhibit 107 (Tr. p. 7, Nov. 29, 1971).

At the time of the recording of the January 20, 1970 nversation, there was in effect (A. p. 102) the June 16, 1967 emorandum by the United States Attorney General setting rth procedures to follow in utilizing recording devices otion Exh. 1, A. p. 99). These procedures included the taining of advance written approval from the Attorney neral for any use of devices to overhear or to record non-lephone conversations without the consent of all of the rties to such conversations.

No written approval was obtained in this instance. Oral proval was given, which included the provision that a court der would be obtained, authorizing the recording (A. p. 4) Court order was obtained and entered in the United ates District Court for the District of Maryland (A. p. 67).

The conversation was recorded in the District of olumbia (A. p. 220).

REASONS FOR GRANTING PETITION

1.

THERE IS NO EVIDENCE TO SUPPORT THE CONVICTION

2

THERE IS NO TESTIMONY PLEADED IN THE INDICTMENT WHICH IS CONTRARY TO THE ALLEGED PERJURED STATEMENT

3

THE COURT BELOW DISREGARDED THE TWO WITNESS RULE

COUNT 6.

This Count charges that Petitioner denied representing Cohen that (a) he had previously told Clark that preventing and reducing the likelihood of Cohen's prosecution would ave to be handled in a way other than Cohen's securing

immunity from prosecution by testifying before a Congressional Committee; and (b) that had it not been for his efforts, Cohen would probably have already been prosecuted.

The testimony which Count 6 recites as being perjury (A. pp. 33-34), briefly narrates as follows: "I think I said earlier that Clark had mentioned something to me about that he could get some money if Cohen could testify and get immunity, and I told him to forget it, that that was not possible. I told Cohen on this occasion that what I told Clark back then was that if he wanted immunity, it would have to be handled in some other way. I did not tell him "that it, meaning defeating the prosecution, stopping the prosecution, would have to be handled by me in some other way.' I never tried to defeat anybody's prosecution. I do not remember Cohen saying to me on that occasion that he regarded me as the one responsible for having kept the prosecution away from him for all these years and that he didn't think it would have happened without my help. He would have no occasion to. I didn't agree with him that I didn't think that the prosecution would have been an abeyance all this time if it hadn't been for my efforts. I made no efforts. I deny saying to Cohen that I didn't think the prosecution would have been in abeyance all that time, if it hadn't been for my efforts."

The recited testimony shows that Petitioner did not deny the statement that "immunity was impossible by testifying before a committee". To the contrary, it is clearly shown in response to the question, "Did you not also tell Cohen on this occasion that what you told Clark back then was that immunity was not possible, but that it would have to be handled in some other way", the reply affirmative, and insisting that the advice was correct, "Well, if he wanted immunity, it would have to be handled some other way". There was no evidence to support the charge of perjury. Thompson vs. City of Louisville, 362 U. S. 189; 4 L. Ed. (2) 654, 659; Taylor vs. Louisiana, 370 U. S. 154. Furthermore, taken with the further statement, recited in the indictment, that "I said earlier that

I told Clark to forget the immunity, that that was not possible", this perjury charge falls because Petitioner's testimony was literally accurate and legally truthful, United States vs. Bronston, 34 L Ed. (2) 568, 93 Sup. Ct.____, and shows he told the Grand Jury substantially what is claimed he denied, Conrad vs. United States, 255 F (2) 247. [1]

Cohen was the sole and only witness concerning the conversation in question. Nowhere does he testify that Petitioner represented to him that had it not been for the efforts of Petitioner, Cohen would "probably have already been prosecuted". Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra. Cohen's testimony that "he said he thought he had done a pretty good job on up to that point" is not corroborated by the tape, [2] and must fall under the two witness rule. Weiler vs. United States, 323 U. S. 606, 608-9.

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(1) Perhaps misapprehension could be had from the next ensuing question, in which Petitioner was asked, "Did you not tell Mr. Cohen that what you said to Mr. Clark was that immunity could not be granted, that it, meaning defeating the prosecution, would have to be handled by you in some other way?" Answer, "Oh, no." Question, "You deny saying that?" Answer, "I certainly do. I never tried to defeat anybody's prosecution." The indictment does not charge that this denial was false, but it may be noted that the government's purported tape transcription reads that Petitioner "Told him (Clark) it couldn't be done...that we'd have to handle it this other way". It is obvious to anyone who will listen to the tape (Government's Exhibit 107, Tr. P. 1587, Nov. 29, 1971), that this statement was "I told 'im (Clark) that 'e'd have to handle it this other way".

(2) In any event, Cohen's testimony that "he said he thought he had done a pretty good job on up to that point" and Cohen's voice on the tape saying "It went away you know. I don't think it would have gone away if you hadn't done something", are entirely consistent with Cohen's request for a Committee investigation of his complaint through his attorney (Government Exhibits 5 and 6, Pages 73 & 74 of the Transcript for Nov. 10, 1971) alleging that he was being mistreated by District of Columbia officials because of a newspaper advertisement and his manner of financing, which he averred to have been approved by an FHA official, Mr. Finney; and this is more particularly true in view of Cohen's testimony that he did not tell Petitioner, or any Congressman or Senator, or even his own lawyer, of his criminal activities (Pgs. 102-3-4 and 110, Transcript for November 11, 1971).

COUNT 7.

This Count alleges that Petitioner denied under oath that Cohen represented to him (a) that a payment of $25,000.00 by and on behalf of Cohen was paid to Petitioner in 1965; and (b) that the payment of the said $25,000.00 to Petitioner had done its job.

The indictment pleads in the Count (A. pp. 35-37) that the Grand Jury testimony of Petitioner, purporting to support the alleged perjurious statements, which briefly narrates as follows: "If Cohen said anything about $25,000.00, I didn't get any connection that he was claiming he paid me $25,000.00. He did not say that he had paid me $25,000.00. I do not remember him saying to me that the $25,000.00 back in 1965 had done its job. I don't believe he did. He never paid me anything."

Cohen's testimony that "I told Mr. Dowdy that...I wasn't there to complain about the $25,000 that I had given him". (Tr. p. 24, Nov. 10, 1971) is not corroborated by the tape nor the purported transcript thereof, and is therefore insufficient to survive the two-witness rule. [3] Weiler vs. United States, supra.

The tape and transcript reveal that Cohen did not tell Petitioner that he had been paid $25,000.00 and Petitioner's denial to the Grand Jury that Cohen had made such a representation to him was truthful. United States vs. Bronston, supra.

There was no testimony from Cohen that he had represented that the "$25,000.00 had done its job". Therefore that part of the charge is without support even in the

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(3) The tape, as well as the government's transcript thereof, reveals that Cohen did not tell Petitioner that he paid him $25,000.00. Obviously, Cohen was avoiding expression to Petitioner that he had made a payment to Petitioner. Cohen wilfully testified that he made such representation to Petitioner, knowing he did not do so. It seems a double standard is being applied in demanding perfect recall by Petitioner, with a much lesser test or even no restriction, for the prosecution's witness.

testimony of the single witness. Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra. Furthermore, the Grand Jury testimony alleged in this Count to be false, goes no further than that Petitioner did not remember such a statement from Cohen.

COUNT 8.

This Count charges that Petitioner had (a) represented to Cohen that he would attempt to assist Cohen by attempting to ascertain the status of an investigation of Cohen then pending before the Department of Justice and in the office of the United States Attorney for the District of Columbia; and (b) expressed to Cohen the hope he could do something for Cohen concerning said investigation.

The testimony pleaded as false in the County (A. pp. 38-43) is lengthy and repetitious, the material portion, including repetitions, briefly narrates as follows: "I never told Cohen that I would check over at the prosecutor's office to see what I could find out for him about the pending investigation. About all I remember about Cohen coming to my office on this occasion is that he still wanted to come before a subcommittee and get immunity. That is about all I recall about the conversation. I do not believe he asked me to see what I could find out or do some checking or anything like that, but he might have brought a little something of that in; I was disgusted with him and told him to go talk to his lawyer.[4] I did not agree to check with the United States Attorney's office or the Department of Justice to see what I could find out. I have never contacted the United States Attorney's office or the Department of Justice on his behalf, and I never told him that I would. I did not tell him that I would check over in the Department or in the United States Attorney's office to see what I could find out about the case and see what

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(4) Actually, telling Cohen to talk to his attorney occurred during Cohen's telephone conversation to Petitioner in Texas a few days before, on January 13, 1970. (Government Exhibit 107, T. pg. 1587, November 29, 1971)

I could do."

Petitioner was repeatedly asked whether he told Cohen he would check with the United States Attorney or the Department of Justice, and each time he said he did not. At no time did Cohen testify that Petitioner said he would contact or check with the United States Attorney or the Justice Department, which was the burden of the questions propounded to Petitioner before the Grand Jury. Neither does the tape contain such a representation.

Taken with Petitioner's Grand Jury testimony that about all he recalled of the conversation was that Cohen still wanted to testify before a committee to get immunity, and that "I don't believe he asked me what I could find out for him, but he might have brought something of that in" any question of perjury is negated. The last charge, that Petitioner "expressed the hope that he could do something for Cohen concerning the said investigation": there was no testimony from Cohen, the single witness, that Petitioner made such an expression; the Grand Jury testimony of Petitioner pleaded in the indictment does not contain or include any testimony on this charge, one way or the other. (The pleading in Count 8, shown at pages 38-43 of the Appendix, is cited to show that there is nothing there plead that Petitioner testified either way on this expression.) It therefore must fall because of no evidence, Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra, and as the pleadings. There being no specifications of the testimony claimed to be false, Petitioner was not informed, acceptably to the Constitution, of the nature of this accusation. United States vs. Simplot, 192 F. Supp. 734, 737.

Furthermore, there was no testimony from Cohen, the single witness, that Petitioner made such an expression (T. pp. 24-5). Thompson vs. City of Louisville, supra; Taylor vs. Louisiana, supra.

4.

PERJURY WAS KNOWINGLY USED TO OBTAIN CONVICTION.

Perjury knowingly used in obtaining the conviction, the conviction will not be allowed to stand. Garrison vs. United States, 154 F. (2) 106. Mooney vs. Holohan, 294 U. S. 103. In Count 7, it is charged that Petitioner denied that Cohen represented to him that a payment of $25,000.00 by and on behalf of Cohen was paid to Petitioner in 1965.

The Tape, as well as the government's transcript thereof, reveals that Cohen did not tell Petitioner that Cohen paid him $25,000.00.

Cohen testified that "I told Mr. Dowdy that...I wasn't there to complain about the $25,000.00 that I had given him". The Tape and the government's transcript of the Tape each reveal that Cohen did not tell Petitioner that he gave him $25,000.00.

Though the Tape shows that Cohen made mention of $25,000.00, it is obvious that Cohen carefully avoided any expression to Petitioner that he had made such payment to Petitioner. Cohen testified further that the U. S. Attorney had instructed him to mention the fact in conversation that he had paid Petitioner $25,000 (A p. 157). [5] and he wilfully testified that he made such representation to Petitioner, knowing he did not do so, and the prosecutors, having the Tape and their transcript, knew that he did not do so when such testimony was elicited from him.

5.

THE RULES AND PROCEDURES ESTABLISHED BY THE ATTORNEY GENERAL WERE NOT OBSERVED IN OBTAINING THE JANUARY 20, 1970, TAPE.

On June 16, 1967, the United States Attorney General

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(5) Prosecution witness, FBI Agent Bonner also testified that Cohen was instructed to pin down his allegation that there was a $25,000.00 bribe. (App. P. 219)

circulated a memorandum setting forth certain procedures for all agencies having responsibility for law enforcement to follow in utilizing electronic and related devices designed to intercept, overhear or record private verbal communications. (Motion Exhibit 1, A. p. 99). These procedures include the obtaining of advance written approval from the Attorney General for any use of mechanical or electronic devices to overhear or record non-telephone conversations without the consent of all of the parties to such conversations. Deputy Assistant Attorney General Henry Edward Petersen testified that oral approval was given for the use of such a device, but along with the approval, the United States attorney was advised that a court order should be obtained. (A. p. 104). Court order was entered in the United States District Court for the District of Maryland. (A. p. 67). The conversation was recorded in the District of Columbia. (A. p. 220)

It is necessarily contemplated that the requirement for a court order would include that the same be validly executed. It is statutory, as well as fundamental law that an order or warrant such as here involved is valid only in the District in which it is entered, namely, the District of Maryland, 18 U. S. C. 2518 (3). The order having been executed in the District of Columbia, there was no compliance with even the oral authorization given under the June 16th, 1967 memorandum.

It may be noted that the Deputy Assistant Attorney General testified that the approval for use of the electronic device was burdened with requirement for a court order only as a precaution. Nevertheless, the requirement was there, the reason for it having been invoked being wholly immaterial.

In this case, the Attorney General did not give his written approval for the recording as required by the memorandum of June 16, 1967, but if the oral approval be deemed sufficient compliance then the United States Attorney failed to comply by obtaining the required court order valid in the District of

Columbia where the recording was made on January 20, 1970.

The law is clear, that as long as a departmental regulation remains operative, it must be obeyed, A government agency must scrupulously observe rules of procedures which it has established, and when it fails to do so its action cannot stand, and courts will strike it down. Accardi vs. Shaughnessy, 347 U. S. 260; United States vs. Heffner, 420 F (2) 809.

SUMMARY

The evidence relating to these three counts in the indictment consisted of only a portion of two pages of testimony, out of a transcript of 4,972 pages, and one Exhibit out of a total of 251 Exhibits, in a trial that lasted 49 days, which was directed to proof and denial of counts one, two and three of the indictment.

With these tiny bits swallowed by a mountain of testimony and exhibits, much of which was held by the Court of Appeals to have been inadmissable, it is not hard to understand how the jury, not versed in the law, and having lost the relevant testimony as a grain of sand in the desert, took the uncontroverted facts that Petitioner did participate in the committee investigation of the Complaints outlined in Government's Exhibits 5 and 6 as evidencing guilt, and carried this forward to Counts 6, 7 and 8, and on the theory that Petitioner was indicted on those, too, just returned a guilty verdict on all counts. United States vs. Beach 296 F (2) 153, 159.

That the jury did so act is emphasized when it is seen that the Court of Appeals wrote in its opinion that "the evidence to show guilt on these counts was overwhelming" (Slip Op. pg. 38), having earlier in the opinion (p.p. 14-15) written that Petitioner flatly denied under oath each of the six representations alleged to be perjury. In the light of the above examination of Counts 6, 7 and 8, Cohen's testimony relating to them, and to the Tape, it becomes clear that the Court of Appeals was in error.

Similarly, the Solicitor General's statement in his Brief in Opposition that "the contradiction between Petitioner's two statements and the proof of the falsity of his grand jury testimony were so overwhelming as to preclude any inference other than that of guilt" would not have been made had he examined the testimony and the matter recited in the third numbered paragraph of each of the counts. These errors, innocent though they might have been, prejudiced Petitioner in his right to a fair and impartial trial, as guaranteed by the United States Constitution.

CONCLUSION

Though either one of the foregoing, taken alone, might not be sufficient, when taken together, this Petition for Rehearing of Petition for Writ of Certiorari should be granted, or, in the alternative, these questions should be remanded to the Court of Appeals for further consideration.

Respectfully submitted,

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